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In the Supreme Court of the United States

OCTOBER TERM, 1975

CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Housing and Urban Development and John R. McDowell, Acting Administrator of the Office of Interstate Land Sales Registration, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-15a), is not yet reported. The Findings of

Fact and Conclusions of Law of the district court are reported at 382 F.Supp. 69 (App. C, *infra*, pp. 18a-33a).

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 16a-17a) was entered on July 30, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Environmental Policy Act requires the Department of Housing and Urban Development to prepare an environmental impact statement before a disclosure statement filed with it by a private real estate developer pursuant to the Interstate Land Sales Full Disclosure Act may become effective.

STATUTES INVOLVED

The relevant portions of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852 *et seq.*, 42 U.S.C. 4321 *et seq.*; and the Interstate Land Sales Full Disclosure Act, 82 Stat. 590 *et seq.*, as amended, 15 U.S.C. 1701 *et seq.* are set out in Appendix D, *infra*, pp. 34a-49a.

STATEMENT

The court of appeals has ruled that the Department of Housing and Urban Development (HUD) and its Office of Interstate Land Sales Registration (OILSR) must prepare an environmental impact statement before a statement of record and property

report filed by a private land developer in accordance with the Interstate Land Sales Full Disclosure Act, 82 Stat. 590 *et seq.*, as amended, 15 U.S.C. 1701 *et seq.* (App. D, *infra*, pp. 37a-44a) may become effective.

The Interstate Land Sales Full Disclosure Act ("the Disclosure Act") was passed in 1968 to prevent abuses in the sale of unimproved tracts of land, by requiring developers to make full public disclosure of information needed by potential buyers. S. Rep. No. 1123, 90th Cong., 2d Sess., p. 109 (1968). The Act is based on the full disclosure provisions of the Securities Act of 1933, which it parallels in many aspects. 111 Cong. Rec. 27310 (1965) (remarks of Senator Williams).[1] Section 1404(a)(1) of the Act makes it unlawful for the developer of a subdivision meeting statutory criteria "to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails * * * to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect * * * and a printed property report * * * is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser." 15 U.S.C. 1703(a)(1) (App. D, *infra*, p. 37a).

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[1] The Disclosure Act was adopted as Title XIV of the Housing and Urban Development Act of 1968, 82 Stat. 476, 590. As proposed by Senator Williams in 1965 and 1967, the Securities and Exchange Commission would have been responsible for its administration. 111 Cong. Rec. 27310-27311 (1965); 113 Cong. Rec. 315-316 (1967).

The statement of record and the property report contain information describing the condition of the subdivision and its state of title. 15 U.S.C. 1705, 1707 (App. D, *infra*, pp. 38a, 43a); 24 C.F.R. Part 1710. The subdivision is registered by filing the statement of record and property report with OILSR; the statement becomes effective automatically on the thirtieth day after filing or such earlier date as the Secretary may determine. 15 U.S.C. 1704, 1706(a) (App. D, *infra*, pp. 37a, 41a); 24 C.F.R. 1710.20, 1710.21. If the Secretary determines that the statement of record is incomplete or inaccurate in any material respect and so notifies the developer within 30 days of filing, the effective date is suspended until the developer files the additional information. 15 U.S.C. 1706(b) (App. D, *infra*, p. 42a).[2]

The statute expressly provides that "[t]he fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean that the Secretary has in any way passed upon the merits of, or given approval to, such subdivision." 15 U.S.C. 1716 (App. D, *infra*, p. 44a). It also prohibits any person from advertising or representing that the Secretary approves or

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[2] The Secretary also has the power to suspend an already effective statement, after notice and opportunity for hearing, if she determines that it includes an untrue statement of a material fact or omits to state any material fact necessary to make the statement not misleading. 15 U.S.C. 1706(d) (App. D, *infra*, p. 42a).

recommends the subdivision or the sale or lease of lots in it. 15 U.S.C. 1707(b), 1716 (App. D, *infra*, p. 44a).

On February 5, 1974, the Flint Ridge Development Company (Flint Ridge) filed a statement of record and property report with OILSR for a 3,000 lot subdivision adjacent to the Illinois River in Oklahoma. After being notified that the filing did not fully conform to the requirements of Section 1406 of the Act and the regulations, Flint Ridge filed an amended statement of record, which became effective on May 2, 1974.

In the meantime, the respondents, the Scenic Rivers Association of Oklahoma and the Illinois River Conservation Council, filed this action in the District Court for the Eastern District of Oklahoma. They alleged that HUD, by permitting the disclosure statements for the Flint Ridge subdivision to become effective, had engaged in "major federal action significantly affecting the quality of the human environment" under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4332(2)(C) (App. D, *infra*, p. 34a); and that HUD must therefore prepare an environmental impact statement before allowing the developer's disclosure statements to become effective.

The district court ordered HUD to prepare an impact statement and "enjoined and restrained [HUD] from approving the * * * filing of Flint Ridge Development Co. until such time as the environmental impact study has been prepared and a

public hearing held thereon." In addition, the court ordered HUD and OILSR to "immediately withdraw the approval of the Flint Ridge Development Co. filing" and, by its own order, declared the filing "suspended, vacated and held for naught" and prohibited all further public sales (App. C, *infra*, pp. 31a, 33a).

On appeal by the federal defendants and Flint Ridge, the court of appeals reversed the district court's holding that there must be a public hearing, but otherwise affirmed the lower court's decision (App. B, *infra*, pp. 16a-17a). In the opinion of the appellate court (App. A, *infra*, pp. 1a-12a), HUD's review of disclosure statements for adequacy under the statute and HUD's regulations (24 C.F.R. Part 1710), constitutes major federal action significantly affecting the quality of the human environment within the meaning of NEPA. A large real estate development, the court said, obviously has an environmental impact. In addition, "[t]he result of [HUD] approval [of disclosure statements] * * * is that the developer is free to seek funds in commerce for the development" (App. A, *infra*, p. 7a). Hence, the court reasoned, this case is analogous to government action in which HUD and other federal agencies approve particular projects, license them, or supply funding or financial guarantees (App. A, *infra*, pp. 6a-9a). The court rejected the government's argument that the statute does not provide for HUD approval, funding or guarantees of developers' proposals, and that its pro-

vision making statements effective within 30 days is inconsistent with NEPA's 75-day minimum period for impact statements (App. A, *infra*, pp. 9a-10a). The limited purpose of the Disclosure Act—to furnish potential buyers with necessary information—is irrelevant, the court ruled, because NEPA requires "attention to environmental problems regardless of whether the agency has authority to do anything about it" (App. A, *infra*, p. 10a).[3] The Act's provision declaring that statements become effective unless suspended was also held irrelevant because, despite the limited suspension authority conferred in the Act, the agency, according to the court, can always suspend them pending the preparation of an impact statement (App. A, *infra*, p. 9a).

REASONS FOR GRANTING THE WRIT

1. The decision below rests on a fundamental misinterpretation of the Interstate Land Sales Full Disclosure Act and Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C). If left standing, the decision will severely interfere with, if not render impossible, the proper administration of the Disclosure Act. Under that Act, HUD currently has on record 7,000 effective filings from developers (of which 871 are from the states comprising the Tenth Circuit) and, if

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[3] The court also held that the Disclosure Act's provision for court of appeals review of orders suspending registrations for incompleteness, inaccuracy, untrue statements or omissions, etc. (15 U.S.C. 1710), were not exclusive; the district court, therefore, had jurisdiction of the NEPA claims under 28 U.S.C. 1331 (App. A, *infra*, pp. 11a-14a).

the court of appeals' reasoning is followed, HUD could be required to prepare an environmental impact statement in regard to each such disclosure statement.[4] The crushing administrative burden this would entail is graphically illustrated by the fact that the number of such environmental impact statements by HUD would exceed the total prepared by all federal agencies during NEPA's first four and a half years.[5] Even if the decision below were confined to future filings, the number of impact statements could be expected to exceed by ten-fold the highest annual number prepared by any agency of the federal government.[6]

Furthermore, the decision has serious implications for other federal agencies with which disclosure statements must be filed. As noted above, the Disclosure

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[4] Moreover, under the decision below, an impact statement might be required whenever a developer files an amendment or a consolidation of prior filings, of which there are approximately 3,000 annually. Hearings on the Department of Housing and Urban Development before a Subcommittee of the House Committee on Appropriations, Part 6, 93d Cong., 2d Sess., p. 1163 (1974).

[5] By June 30, 1974, environmental impact statements had been prepared on 5,430 agency actions, of which 3,344 were final statements and 2,086 were drafts. The Department of Transportation, which has filed the largest number of statements, in 1973 filed a total of 432. *Fifth Annual Report of the Council on Environmental Quality*, pp. 388-391 (1974).

[6] Compare n. 5, *supra*, with the fact that in fiscal year 1974, 652 initial registrations, 520 consolidations and 3,414 amendments were filed. Hearings on the Department of Housing and Urban Development before a Subcommittee of the House Committee on Appropriations, Part 5, 94th Cong., 1st Sess., p. 923 (1975).

Act is patterned on the disclosure provisions of the Securities Act of 1933, 48 Stat. 77-80, as amended, 15 U.S.C. 77e-77h. If, as the court of appeals indicates (App. A, *infra*, p. 8a), the Securities and Exchange Commission must prepare environmental impact statements in regard to offerings of corporate securities, the Nation's private capital markets could be severely affected by the resulting delays.[7]

2. These consequences result, we submit, from the court of appeals' misreading of the statutes involved. Section 102(2)(C) of NEPA requires federal agencies to include an environmental impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment * * *." But under the Disclosure Act, HUD makes no "recommendation or report" on a proposal for major federal action—a prerequisite for requiring an environmental impact statement under NEPA. See *Aberdeen & Rockfish R. Co.* v. *SCRAP*, No. 73-1966, decided June 24, 1975, slip op. 26. Indeed, the Disclosure Act (15 U.S.C. 1707(b), 1716 (App. D, *infra*, 44a)) expressly provides that a developer's effective filing is not a determination by HUD of the truth or accuracy of the statements contained therein, or evidence that the agency has in any way passed upon the merits or given approval

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[7] During fiscal 1975, a total of 2,781 registration statements, involving securities offerings with an aggregate value of $77.46 billion, became effective pursuant to the Securities Act of 1933.

to the project. HUD's powers under the Act are limited to assuring that when developers sell lots, they disclose relevant facts to potential purchasers. HUD's performance of this disclosure function does not constitute major federal action within the meaning of NEPA and it does not constitute a report on a proposal for major federal action.

The purpose of NEPA is to assure that federal agencies consider environmental effects along with other factors in their decision-making. S. Rep. No. 91-296, 91st Cong., 1st Sess., pp. 19-20 (1969); 115 Cong. Rec. 40416 (1969). NEPA thus assumes that the relevant federal agency has substantive "go-ahead" authority (*e.g.*, power to approve a project on its merits, licensing authority, or funding responsibilities). See *Biderman* v. *Morton*, 497 F.2d 1141, 1147-1148 (C.A. 2). The Disclosure Act does not confer any such authority on HUD. In administering the Act, HUD grants no approvals to subdivisions, has no planning function, disburses no funds and gives no guarantees, has no control over the design of subdivisions and no power to stop private development. It is not, in any sense, in partnership with the private developer. Cf. *Silva* v. *Romney*, 473 F.2d 287 (C.A. 1). It is concerned only with the adequacy of disclosure to potential purchasers of information relevant to the sale or lease of lots. If the developer makes adequate disclosure, HUD has no discretion to suspend the effectiveness of his statements.

Nor, as the court of appeals erroneously assumed (App. A, *infra*, pp. 6a, 7a-9a), are disclosure state-

ments a legal prerequisite to the initial financing and other pre-sale steps in the development of a subdivision. As was the case here, a developer may be substantially funded well in advance of filing with HUD, and may put in roads, lay out lots, arrange for water and sewage, and start construction on other facilities before he is ready to sell lots. Because the Disclosure Act is a prerequisite only to the sale or lease of lots (15 U.S.C. 1703(a)(1) (App. D, *infra*, p. 37a)), and not to the funding of developments, the actions most significantly affecting the environment can occur well before the developer is required to file his disclosure statements. But even if an effective filing enhances a developer's ability to raise funds in the private capital market, this is irrelevant to the purpose of the Disclosure Act.

The court below appears to have misunderstood the Disclosure Act's purpose and function. Both the statute (15 U.S.C. 1707(b), 1716 (App. D, *infra*, p. 44a)), and its legislative history make clear that HUD was not to pass on the merits of developers' projects in any way. The Act was intended to protect consumers through the process of disclosure, in the same way that the securities law, on which it was modeled, protects investors. Thus in explaining the legislation, Senate Report No. 1123 (*supra*, at 110; emphasis added), provides:

> These requirements mean that the seller of undeveloped land covered by this title would be required to inform the purchaser not only of the desirable aspects but also of any undesir-

> able aspects. The purchaser will then be better able to make an intelligent decision. *This proposal does not authorize the Federal Government to pass upon the quality of what is being sold or upon such questions as land value, land use, or zoning.* Its purpose is to give the purchaser the information necessary to make his own determination of the quality of what is being sold.

The court of appeals' decision substantially frustrates Congress' intention that the Disclosure Act not affect the traditional responsibility of state and local governments for land use planning and substantive regulation of developments.[8] Requiring HUD to suspend developers' filings until it has prepared an environmental impact statement on their project obviously puts a federal agency in the business of passing on the environmental merits of particular subdivisions, thus turning this limited disclosure statute into a federal program of land use control. This transformation is not justified by NEPA. NEPA was not intended to make federal agencies

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[8] Many state and local governments impose environmental regulation upon new subdivisions. See *Fifth Annual Report of the Council on Environmental Quality, supra,* at 49-70. And HUD recognizes that disclosure of some of the environmental aspects of a subdivision is necessary to protect prospective purchasers. It therefore requires such information in the statement of record and property report. The developer must provide information on such factors as roads, water, sewage, drainage, soil erosion, climate, nuisances, natural hazards, municipal services and zoning restrictions. He must also identify all government agencies which regulate the subdivision or which must issue permits which materially affect the subdivision. 24 C.F.R. 1710.105, 1710.110.

"disclose" the environmental effects of private actions over which they have no substantive control.[9]

That NEPA is inapplicable to developers' filings with HUD is further reflected in the Disclosure Act's provision that a statement of record becomes effective automatically 30 days after filing unless the Secretary acts affirmatively, within that time, to suspend it for inadequate disclosure. 15 U.S.C. 1706 (App. D, *infra*, p. 41a).[10] It is inconceivable that in 30 days an environmental impact statement could be prepared, circulated, commented upon, and then reviewed in light of the comments. This time period is inadequate to allow for the kind of careful, long-range planning envisioned by NEPA. The court of

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[9] Because the language and legislative history of the Disclosure Act make clear that it confers on HUD no power to approve, endorse, guarantee, or finance developments, the court of appeals erred in relying on cases under other statutes involving such major federal actions as approvals, licenses, funding or guarantees (App. A, *infra*, pp. 6a-9a). Its error is illustrated by its reliance on *Davis* v. *Morton*, 469 F.2d 593 (C.A. 10), which it described as dealing "with a matter * * * very similar to that here presented" (App. A, *infra*, pp. 6a-7a). That case held that an impact statement was required from the Department of the Interior for a long term lease of Indian lands because the lease was subject to approval, modification or disapproval by the Secretary. No similar substantive regulatory power is granted to, or exercised by, HUD under the Disclosure Act.

[10] Compare Section 8(a) of the Securities Act of 1933, 15 U.S.C. 77h(a), which provides that the registration statement for a securities offering becomes effective twenty days after it is filed in the absence of a delaying amendment by the registrant or a stop order proceeding by the SEC. See *Jones* v. *Securities & Exchange Commission*, 298 U.S. 1, 15-18.

appeals attempted to avoid this problem by holding that "[t]here is nothing in the statute, * * * which prohibits the agency from suspending a statement of record pending the preparation and filing of an impact statement" (App. A, *infra*, p. 9a). On the contrary, the statute expressly limits HUD's suspension power to situations in which the developer has failed to make the required disclosure. 15 U.S.C. 1706 (App. D, *infra*, pp. 41a-42a). The court of appeals' reading of the statute renders the 30-day provision a nullity in regard to every subdivision that has sufficient environmental impact to require some form of environmental clearance. In such cases, no statements of record could go into effect within the 30 days provided by Congress, yet the purpose of that provision, as the court below itself recognized (App. A, *infra*, p. 9a), is to protect developers from costly delays as a result of the need to register with HUD.[11]

3. The Securities and Exchange Commission has advised us that it believes the Court should grant the writ because of the decision's possible adverse effects on securities regulation (see pp. 8-9 *supra*).

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[11] The court also suggested that "a developer could give advance notice to HUD of its intent to sell land in interstate commerce, whereby HUD could commence the preparation of its impact statement" (App. A, *infra*, pp. 9a-10a). Such an approach would not avoid the delays inherent in preparing an impact statement because the agency could not begin to weigh the environmental merits of a project until the developer was ready to begin sales, *i.e.*, when the plans for the subdivision were fully worked out.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 74-1520 and 74-1750

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL, corporations, PLAINTIFFS-APPELLEES

v.

JAMES T. LYNN, Secretary of Housing and Urban Development, and GEORGE K. BERNSTEIN, Administrator of Interstate Land Sales, Department of Housing and Urban Development, DEFENDANTS-APPELLANTS

and

FLINT RIDGE DEVELOPMENT COMPANY, INTERVENING DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 74-131-C)

Before LEWIS, Chief Judge, and MCWILLIAMS and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This is an appeal from an order, judgment and decree of the United States District Court for the Eastern District of Oklahoma in which the defendants-appellants were enjoined pending the preparation of an environmental impact study "of the effects of the Flint Ridge Development on the quality of the human environment" by the Secretary of Housing and Urban Development and Office of the Interstate Land Sales Registration, a division of the Department of Housing and Urban Development. The essential holding of the trial court was that the responsibilities of the Department of Housing and Urban Development were of such a nature as to require the preparation of an impact statement pursuant to the requirements of the National Environmental Policy Act, 42 U.S.C. § 4331 et seq.

The action herein was filed on April 24, 1974 by the Scenic Rivers Association and the Illinois River Conservation Council. Named as defendants were Lynn, Secretary of the Department of Housing and Urban Development (HUD) and Bernstein, Administrator of the Office of Interstate Land Sales Registration (OILSR). In this suit a declaratory judgment was sought that HUD must conduct an environmental study and file an impact statement prior to its approval of a filing with the OILSR. Also sought was an injunction pending a determination in the case, together with the issuance of a mandatory order compelling the Secretary to comply with NEPA. In addition, plaintiffs sought a preliminary injunction requiring HUD to withdraw approval of the state-

ment of record and property report which had been filed by Flint Ridge Development Company on February 5, 1974.

Flint Ridge was engaged in developing an area along the Illinois River in Oklahoma. In order to do so it was required to file certain documents under the Interstate Land Sales Act, 15 U.S.C. § 1701 et seq. This is a prerequisite to the sale of lots in commerce. The original filing of Flint Ridge was determined to be inadequate and an amended statement of record was filed by Flint Ridge. This was effective as of May 2, 1974, that is, after filing of the present lawsuit.

The order that is now being reviewed was issued following a hearing on preliminary injunction on July 31, 1974. Flint Ridge had been allowed to intervene and the hearing on injunction was merged with the hearing on the merits. Evidence was presented, and on August 2, 1974, the ruling from the bench which was later formalized in findings and opinion held that HUD was required to prepare an impact statement. The court further ordered that the Flint Ridge statement be suspended. Later, on September 4, 1974, the trial court filed its findings of fact and conclusions of law and an order. This enjoined HUD and OILSR from approving the Flint Ridge filing until an environmental impact study had been prepared and a hearing held thereon. The court ordered immediate withdrawal of the approval which had been given May 2 and ordered defendants-appellants to comply with the NEPA procedures.

The effect of the court's orders suspending the statement of record was that it forbade interstate sales until further order of the court. Unquestionably the development would have had a substantial impact on the environment inasmuch as the Illinois River is a state-designated scenic river. Three thousand lots were to have been sold. On each would have been a home with a septic tank for disposal of human refuse, which refuse would have contaminated the river. The trial court considered this fact in determining that the filing with HUD and OILSR was major federal action which would significantly affect the quality of the human environment.

The government agencies and Flint Ridge are the appellants in the present proceedings. They contend that the court erred:

1) In holding that the filing under the Interstate Land Sales Act constituted major federal action;

2) In ruling that an impact statement had to be prepared prior to the approval of a filing. The contention was here that to so read the National Environmental Policy Act is to create an irreconcilable conflict between NEPA and the Interstate Land Sales Act;

3) In requiring a public hearing;

4) In ruling that there was jurisdiction to consider the question as to whether NEPA limited the Interstate Land Sales Act and to enjoin the actions of HUD and OILSR in deference to the provisions of NEPA.

I.

The first question is whether NEPA applies to the actions of the OILSR. The relevant provision of NEPA requires that "to the fullest extent possible" all agencies of the Federal Government shall prepare a detailed environmental impact statement for all "major Federal Actions significantly affecting the quality of the human environment." [1] The defendants-appellants take the position that review of the statements of record which are required to be filed under the Interstate Land Sales Act does not constitute major federal action. As we have above shown, the district court disagreed with this and enjoined OILSR from approving the statement of record until it had filed an impact statement. Therefore, the question boils down to whether the action on the part of OILSR

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[1] The relevant NEPA provision as read in context furnishes a better picture of its requirements:

> The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

constitutes a major federal action significantly affecting quality of the human environment. The argument is that the action is largely a private one involving as it does the filing of the statement, but it is more than that because OILSR does have the authority to suspend a statement, the effect of which is to cut off raising funds in interstate which would be otherwise available. Thus, this allows the Federal Government to suspend a private action which would unquestionably affect the environment.

Our decision in Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) dealt with a matter which was very similar to that here presented. A 99-year lease of Indian lands was executed by the Pueblo of Tesuque. The lease was to the Sangre de Cristo Development Company, Inc. as lessee. The district court there held that the Secretary of the Interior was not required to file an impact statement prior to approval or disapproval of a lease between the Tribe and the developer. The trial court was impressed by the fact that the United States had not initiated the lease, was not a party, had no interest and the government action was limited to approval or disapproval. Our court reversed, holding that the Secretary's authority to ratify or reject leases on Indian lands would come within the terms of NEPA. The opinion quoted the broad purpose of NEPA as set forth in 42 U.S.C. § 4331 (b) as showing the intention of Congress to preserve the environment.[2] Cited with approval was Greene

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[2] The court said:

> [I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with

County Planning Board v. Federal Power Comm'n, 455 F.2d 412 (2d Cir. 1972), holding that the granting of a license to construct a high voltage line constituted major federal action. Also relied on was Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971), requiring the Atomic Energy Commission to prepare an environmental impact statement before issuing an interim operating license for a nuclear power plant.

The similarity between our case and *Davis* is that both involve filing and approval of private action. The result of approval here is that the developer is free to seek funds in commerce for the development. In each instance the filing is a preliminary step which is followed by substantial consequences to the environment; thus, there is action which leads to the development which in turn affects the human environment.

There are many cases which hold that the impact resulting from governmental funds is capable of sig-

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other essential considerations of national policy, to . . . (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; . . . .

469 F.2d at 596.

nificantly affecting the quality of the environment, a condition which is not far different from ours.[3]

It is true that funding could be obtained within the State of Oklahoma even without approval, but obviously the obtaining of funds interstate is important. If it were not important, Flint Ridge would not be litigating the present issue.

An analogy is shown in the case of the giving of a guarantee by HUD. This has a significant affect [*sic*]. *See* Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974); Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973). *See, also,* National Resources Defense Council, Inc. v. S.E.C., 389 F. Supp. 689 (D.D.C. 1974) in which it was held that NEPA applies to S.E.C. offerings. The filing with the S.E.C. is not dissimilar to a filing under the Interstate Land Sales Act.

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[3] *See* Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973) (Economic Development Administration loan commitment to finance a portion of construction costs for expanding a private plant); Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973) (HUD loan and grant); Silva v. Romney, 473 F.2d 287 (1st Cir. 1973) (HUD mortgage guarantee and interest grant for private housing project); San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973) (HUD loan and grant); Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972) (Department of Transportation determination to fund highway); City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972) (Federal Aviation Agency funding for airport extension); Upper Pecos Ass'n v. Stans, 452 F.2d 1233 (10th Cir. 1971), *vacated and remanded on other grounds,* 406 U.S. 944 (1972) (Economic Development Administration grant for construction of highway); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) (Law Enforcement Assistance Administration approval of funds for construction of rehabilitation center).

In sum, then, the consequences of the government's approval of the statement in terms of ease of obtaining funds and in terms of the ultimate direct consequences on the environment of the building of the houses lead to the conclusion that the district court was correct in holding that major federal action significantly affecting the quality of the human environment was present.

II.

Appellants further maintain that the Interstate Land Sales Act is by its terms inconsistent with NEPA in that it requires that the statement of record filed by the land developer become effective 30 days after it is filed unless the agency acts to suspend it, whereas the NEPA procedure has a minimum requirement of 75 days. The argument goes that it is impossible for the Office of Interstate Land Sales to comply. We regard this as superficial. Clearly, Congress put the automatic 30 day provision in the Act out of concern about possible delay in agency action and in turn the interstate land sales. There is nothing in the statute, however, which prohibits the agency from suspending a statement of record pending the preparation and filing of an impact statement. The First Circuit has suggested that HUD promulgate regulations designed to preserve the status quo during the period of preparation of the impact statement. *See* Silva v. Romney, 473 F.2d 287 (1st Cir. 1973). Thus, a developer could give advance notice to HUD of its intent to sell land in interstate commerce, whereby HUD could commence

the preparation of its impact statement. There is evidence that Congress never intended for the 30 day provision to be absolute so as to exclude the applicability of NEPA; evidence the fact that it allowed the statement of record to be suspended.

The other argument advanced is that Congress showed its intention that the NEPA requirement was not applicable. This again loses sight of the fact that the NEPA impact statement requirement applies to virtually all federal agencies and is not limited to those that are concerned with the environment. One of its purposes is to require the giving of attention to environmental problems regardless of whether the agency has authority to do anything about it.[4]

The Supreme Court has held in one case that the ICC was not required to prepare an impact statement. *See* United States v. S.C.R.A.P., 412 U.S. 669 (1973). The ICC had refused on a temporary basis to suspend a proposed rate increase. While it was determining whether the rate increase ought to be suspended permanently, the district court enjoined it from approving the rate increase as to recycled goods until it had filed a NEPA impact statement. By the terms of the statute, however, the rate suspension question was placed in the exclusive juris-

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[4] *See* Jones v. Lynn, 477 F.2d 885, 981 (1st Cir. 1973); Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 833 (D.C. Cir. 1972); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

diction of the ICC during the seven month consideration period as to whether the rate should be suspended. The Supreme Court had so construed the statute in Arrow Transportation Co. v. Southern Ry. Co., 372 U.S. 658 (1963). The fact that the Supreme Court decided to review this case and thus regarded the question whether the ICC *might* have to file a NEPA statement shows the broad sweep and range of the NEPA requirement and demonstrates that it is not to be lightly disregarded. Certainly the presence of the 30-day requirement does not create inconsistency or an impediment to requiring the agency to prepare an impact statement.

Finally, it is readily apparent that these statutes, NEPA and Interstate Land Sales, are not incompatible. Both are designed to give information to the public, but in each instance it is a different kind of information. Rather than being inconsistent or incompatible they complement one another in furnishing the public with a full range of information.

III.

Did the district court lack jurisdiction to hear and determine this matter as a federal question case? We have heretofore recognized that the district court is authorized to entertain a case such as this one arising under federal law. *See* National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971). We there held that the National Helium Corp. could challenge the termination of government contracts, which terminations were taking place without first observing

the requirements of NEPA. In that instance also it was by way of the injunction. National Helium recognized that the underlying substantive federal question was the NEPA requirement. Also, our decision in Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) impliedly held that several kinds of federal violations gave rise to district court jurisdiction to compel the government agency to comply with the mandates of NEPA.

Flint Ridge maintains, however, that the Interstate Land Sales Act has a provision for review by the court of appeals and that this precludes district court action. This statute declares.

> Any person, aggrieved by an order or determination of the Secretary issued after a hearing, may obtain a review of such order or determination in the court of appeals of the United States . . . by filing in such court, within sixty days after the entry of such order or determination, a written petition praying that the order or determination of the Secretary be modified or be set aside in whole or in part . . . Upon the filing of such petition, the jurisdiction of the court shall be exclusive . . . .

15 U.S.C. § 1710(b) [*sic*].

Thus, this Act provides for hearings on the request of a developer when the Secretary suspends the statement prior to its effective date for the purpose of obtaining additional information and, too, for review of an order of the Secretary when he wishes to suspend a statement of record already in effect. 15 U.S.C.

§ 1706(b) and (d). Such hearings are public ones in which a record is made.

It is plain from a reading of the statute that this procedure does not apply here because the agency action for which review is provided has not here taken place and could not take place because it is entirely out of context with the present problem.

Nor does Anaconda v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973) apply. In *Anaconda* the effort was to bypass review by the appropriate court of appeals.

We have examined the other decision relied on, namely, Environmental Defense Fund v. Environmental Protection Agency, 485 F.2d 780 (D.C. Cir. 1973). That one is also plainly inapplicable.

The Supreme Court's decision in *S.C.R.A.P.*, *supra*, is entirely consistent with the position we take because there the effort was to interfere with the decision of an administrative tribunal which Congress and the Supreme Court had recognized was within the exclusive jurisdiction of the tribunal.

The case of Adolphus v. Zebelman, 486 F.2d 1323 (8th Cir. 1973) has recognized that a district court has jurisdiction to enjoin a developer from making interstate land sales when its statement of record violates the Act.

Because, then, of the broad scale application of NEPA and the manifest intention of Congress that all federal agencies with responsibilities which effect

the environment must observe its requirements, the jurisdiction of the district court is present.[5]

IV.

Was the district court correct in its ruling that there should be a public hearing in connection with the environmental impact statement? We agree with HUD that the question whether a public hearing is to be held is within the agency's discretion. The statute does not prescribe that the hearing be either public or adversary. The courts have consistently held to this proposition.[6]

HUD's proposed regulations do not require public hearings in all cases, and the Proposed Rules § 50.20 hold that the question whether a public hearing shall be held on a draft environmental impact statement is an administrative decision. This regulation outlines the factors to be considered: magnitude of the proposal, degree of interest, complexity of the issue and the extent to which public involvement has

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[5] We deem it unnecessary to discuss the issue of standing because it is not seriously contended that the plaintiffs here lacked standing to bring the suit.

[6] Jicarilla Apache Tribe v. Morton, 471 F.2d 1275 (9th Cir. 1973); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971); Natural Resources Defense Council, Inc. v. TVA, 367 F. Supp. 128 (E.D. Tenn. 1973), *aff'd*, 502 F.2d 852 (6th Cir. 1974); Ford v. Train, 364 F. Supp. 227 (W.D.Wis. 1973); Citizens for Clear Air, Inc. v. Corps of Engineers, U.S. Army, 356 F. Supp. 14 (S.D.N.Y. 1973); City of New York v. United States, 344 F. Supp. 929 (E.D.N.Y. 1972); San Francisco Tomorrow v. Romney, 342 F. Supp. 77 (N.D. Cal. 1972), *rev'd in part on other grounds*, 472 F.2d 1021 (9th Cir. 1973).

been achieved. The appellees contend that the Flint Ridge development meets all the criteria. As noted, however, this is an agency question. The present action is to compel compliance with the mandatory requirements of NEPA. Obviously the holding of a public hearing is not mandatory.

The judgment of the district court is affirmed in all respects except the requirement of a public hearing. That holding is reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM—JULY 30, 1975

Before The Honorable David T. Lewis, Chief Judge, The Honorable Robert H. McWilliams and The Honorable William E. Doyle, Circuit Judges

No. 74-1520

No. 74-1750

(D.C. No. 74-131-C)

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL, corporations, PLAINTIFFS-APPELLEES,

vs.

JAMES T. LYNN, Secretary of Housing and Urban Development, and GEORGE K. BERNSTEIN, Administrator of Interstate Land Sales, Department of Housing and Urban Development, DEFENDANTS-APPELLANTS,

and

FLINT RIDGE DEVELOPMENT COMPANY, INTERVENING DEFENDANT-APPELLANT.

This cause came on to be heard on the record on appeal from the United States District Court for the Eastern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed in all respects except the requirement of a public hearing. The district court's ruling that there should be a public hearing is reversed. The cause is remanded to the United States District Court for the Eastern District of Oklahoma for further proceedings consistent with the opinion of this Court.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy

Teste

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

/s/ Mary A. Sherman
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
E. D. OKLAHOMA

No. 74-131-C

Sept. 4, 1974

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL, corporations, PLAINTIFFS,

v.

JAMES T. LYNN, Secretary of Housing and Urban Development, and GEORGE K. BERNSTEIN, Administrator of Interstate Land Sales, Department of Housing and Urban Development, DEFENDANTS,

and

FLINT RIDGE DEVELOPMENT CO., a joint venture, INTERVENING DEFENTANT,

and

THE UNITED STATES OF AMERICA ex rel. THE ENVIRONMENTAL PROTECTION AGENCY, ADDITIONAL DEFENDANT.

* * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BOHANON, District Judge.

Statement of Case

The Scenic Rivers Association of Oklahoma, an Oklahoma non-profit corporation, and The Illinois

River Conservation Council, Inc., a non-profit Oklahoma corporation, filed this action in this court for the following reasons:

1. Plaintiffs seek a declaratory judgment decreeing that the Department of Housing and Urban Development, the agency in charge of administering the Interstate Land Sales Act, 15 U.S.C. § 1701 et seq., must, prior to approval and registration of a Statement of Record and Property Report under the Interstate Land Sales Act, conduct an environmental impact study in compliance with the National Environmental Policy Act, 42 U.S.C. § 4331 et seq., and the guidelines of the Council on Environmental Quality and the Department's own guidelines promulgated under the National Environmental Policy Act requirements.

2. Plaintiffs further seek injunctive relief requiring H.U.D. to withdraw approval of Interstate Land Sales filings pending the Environmental Review Process as same pertains to the Property Report and Statement of Record filed by Flint Ridge Development Co. effective May 2, 1974.

Flint Ridge Development Co. joined these proceedings as an intervening defendant on the morning this case was brought to trial, first requesting to appear as *Amicus Curiae*, which request was denied. Then Flint Ridge Development Co. was permitted to intervene as a party defendant with the understanding that it could withdraw at the end of the trial if it chose to do so. The Court finds now that Flint Ridge Development Company may with-

draw if it chooses to do so, but to the knowledge of the Court it has not filed any written request to withdraw from these proceedings so the Court finds that Flint Ridge may or may not remain in the case as it sees fit.

This action is primarily and in all things an action against the defendants James T. Lynn, Secretary of Housing and Urban Development, and George K. Bernstein, Administrator of Interstate Land Sales, Department of Housing and Urban Development, and the United States of America, ex rel the Environmental Protection Agency, for the sole purpose of requiring these governmental agencies to comply with the Acts of Congress relating to environmental protection. This action has two principal issues for the Court to determine:

1. Whether H.U.D.'s action in approving the Property Report and Statement of Record for Flint Ridge Development Co., under the Interstate Land Sales Act, constituted major federal action; and

2. Whether the development itself, together with any peripheral developments associated therewith, would significantly affect the quality of the human environment, of which the Illinois River, its basin and tributaries, is a part.

The Court heard many learned expert witnesses who testified generally and specifically as to the actual potential result of the Flint Ridge Development Co.'s project in the counties of Delaware and Adair, Oklahoma. The Court heard testimony of the Flint Ridge

Development Co., the federal defendant, H.U.D. and the Oklahoma State Departments of Health and Water Resources.

The Court, having carefully examined the files, briefs, pleadings, testimony, exhibits and the issues involved in this case, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The Illinois River and its basin which is situated in eastern Oklahoma beginning at the western boundary of Arkansas and continuing westerly to Lake Tenkiller near Muskogee, Oklahoma, is within the boundaries of the Eastern District of Oklahoma.

2. The plaintiffs are both residents of the State of Oklahoma and are actively engaged in the preservation of the Illinois River basin and other similar areas in Oklahoma.

3. "Flint Ridge" is a joint venture organized and promoted by Flint Ridge Development Company. The Court finds that Flint Ridge Development Co. has located its joint venture project on the Illinois River basin because of the beauty the river affords for such a development. The attractiveness of the Illinois River basin was and is the motivating factor in Flint Ridge Development Co. seeking out this specific location for promotional purposes.

4. Flint Ridge Development Co. has filed its Statement of Record and Property Report and has divided the property for the purpose of selling to prospective

home builders throughout the United States and has done so by use of the United States mails.

5. Flint Ridge Development Co. proposes to sell 3,000 lots ranging in price from $6,500 to $25,000 per vacant lot. If each lot sold for $6,500, the gross revenue to the development would be $19,500,000; that if all 3,000 lots were sold at $25,000 each, the gross sales would be $75,000,000; that if the gross amounts were added together and divided by two, Flint Ridge Development Co. would have a gross income of $47,250,000. These figures reflect the magnitude of the development and show that H.U.D.'s action in approving the Property Report and Statement of Record under the Interstate Land Sales Act constituted major federal action.

6. Flint Ridge Development Co. is a joint venture composed of Frates Development Company, Tulsa, and Flint Ridge Development Co., Inc. of Tulsa, Oklahoma. Frates Development Company is a subsidiary of Frates Properties, Inc., of Tulsa, Oklahoma, and Flint Ridge Development Co., Inc. is a wholly owned subsidiary of Context Industries, Inc., of Miami, Florida. This joint venture owns the development known as "Flint Ridge" and does business in the Eastern District of Oklahoma.

7. The Department of Housing and Urban Development is a federal instrumentality which, through its sub-agency, the Office of Interstate Land Sales, has statutory and administrative responsibilities for enforcement and administration of the Interstate Land Sales Act.

8. The plaintiff organizations are comprised of individuals and affiliated conservation outdoor organizations. Plaintiffs have filed with the Clerk of this Court a list of several thousands of signatures of individuals living in and around the eastern part of Oklahoma stating and claiming frequent and consistent use of the Illinois River for purposes of hiking, camping, scouting, canoeing, fishing, swimming and general outdoor recreational purposes.

9. The United States Constitution provides that Congress shall regulate Interstate Commerce and Congress saw fit to create the statutory authority for H.U.D. to administer the Interstate Land Sales Act and also to establish the Environmental Protection Agency for the sole purpose of protecting environmental areas for the use of the citizens of this country.

10. The Illinois River is a state-designated "scenic River" and the river as a matter of fact possesses substantial esthetic qualities, which qualities in fact caused Flint Ridge Development Co. to undertake its development in this area.

11. The evidence is clear that the present and proposed development by Flint Ridge Development Co. comprises approximately 7,000 acres, with an ultimate proposal of acquiring an additional 14,000 acres.

12. The Court finds that each lot sold and home built will contain a septic tank for all human refuse. Upon completion of the project 3,000 septic tanks will dispose refuse into the Illinois River. The soil

in this particular area is made up primarily of limestone gravel, chert rock or gravel and clay, and that the soil is very porous and the seepage from the 3,000 septic tanks will soon find its way into the clear waters of the Illinois River and cause pollution damage thereof and destroy forever the environmental quality of the Illinois River Basin.

13. It is important to remember that plaintiffs made demand upon H.U.D. to prepare an environmental impact statement prior to approval of the Statement of Record and Property Report. This H.U.D. refused to do. The Court finds that H.U.D.'s refusal to prepare the environmental impact statement and to perform its duty under the guidelines of the National Environmental Policy Act, the Council of Environmental Quality or its regulations was serious dereliction of its duty imposed upon it by Congress.

14. Flint Ridge Development, together with its peripheral developments has actual or potential substantial effect upon the depth and course of the Illinois River, its tributaries and drainage area, to the plant life, the wildlife habitats, the fish and wildlife, soils, air, esthetics of the area and upon the socio-economic conditions in the area including such matters as health and hospital care and facilities, roads and highways, schools, police and fire protection.

15. Flint Ridge Development Co. is an organization which directly or indirectly sells or leases, or offers to sell or lease, or advertises for sale or lease, lots in a subdivision, containing more than 50 lots,

pursuant to a common sales scheme and in Interstate Commerce.

16. Under the Interstate Land Sales Act the Office of Interstate Land Sales, a sub-agency of the Department of Housing and Urban Development, has the authority and duty to issue rules and regulations providing for an exemption from the provisions of the Act, the authority to review filings under the Act, and to note deficiencies therein (thereby suspending the effectiveness of the filing until such time additional information as the Secretary shall require is provided and the deficiencies corrected), the authority to conduct hearings and make findings and conclusions with respect thereto in connection with filings under the Act, the authority to suspend the effectiveness of the Statement of Record and Property Report under amendments filed subsequent to the effective date of the Act of the filings, the authority to suspend the Statement of Record upon a finding of any untrue statement of a material fact or omission to state any material fact required to be stated or necessary to make the statements not misleading, and the authority to conduct investigations and initiate criminal prosecutions for violation of the provisions of the Interstate Land Sales Act.

That upon the initial filing of the Statement of Record and Property Report by Flint Ridge Development Co., the Office of Interstate Land Sales did in fact find deficiencies and did in fact suspend the effectiveness of the Statement of Record in excess of 30 days from the filing date and according to the

testimony of an official representative of the Office of Interstate Land Sales that Flint Ridge Development Co. was prohibited from selling lots during the period of this suspension.

17. That whenever a Federal agency makes a decision which permits action by other parties, public or private, which will affect the quality of the human environment, such decision constitutes major federal action, which is what occurred in this case. Scientists' Institute for Public Information, Inc. v. A.E.C., 156 U.S.App.D.C. 395, 481 F.2d 1079 (1973).

18. That there is an overriding public interest in preservation of the character of the area described generally as the Illinois River Basin and that the public interest in preserving the character of that ecosystem is one that the plaintiffs may seek to protect by obtaining equitable relief. Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (C.A. 10, 1973).

19. That the Department of Housing and Urban Development by its subagency, the Office of Interstate Land Sales, has not brought its policies and procedures into compliance with requirements of the National Environmental Policy Act, Title 42 U.S.C. Sec. 4333, in that they have no rules, regulations or guidelines promulgated so as to enable them to comply with the National Environmental Policy Act's purposes and intendments.

20. That the defendant, H.U.D., and the Office of Interstate Land Sales, in administering and enforcing the Interstate Land Sales Act and making deci-

sions associated with such administration and enforcement, have not, in whole or in part, complied with any of the mandatory requirements contained in 42 U.S.C. Sec. 4332.

Conclusions of Law

1. The Court has jurisdiction and venue (28 U.S.C. § 1391(e)) over the instant case and the plaintiffs have standing to bring this action.

2. The National Environmental Policy Act applies to all Federal agencies and their subdivisions and requires that all Federal agencies "to the fullest extent possible" must strictly comply with the requirements of the National Environmental Policy Act. The Court further finds as a matter of law that every Federal agency, at the lowest possible level, is required to consider the effects of each decision made by that agency upon the environment and to use all practicable means to avoid environmental degradation. Calvert Cliffs' Coordinating Committee v. A.E.C., 146 U.S.App.D.C. 33, 449 F.2d 1109 (1971); Davis v. Morton, 469 F.2d 593 (C.A. 10, 1972); Ely v. Velde, 451 F.2d 1130 (C.A. 4, 1971); See, National Helium Corporation v. Morton, 455 F.2d 650 (C.A. 10, 1971).

3. There is nothing contained within the Interstate Land Sales Act which specifically excludes N.E.P.A. application. See, Davis v. Morton, *supra.*

4. H.U.D. contends there is no major federal action involved. The concept of major federal action

has evolved from the concept of Federal planning, participation in, funding or benefit from a project. See Natural Resources, Inc. v. Grant, 341 F.Supp. 356 (E.D.N.C., 1972), to include those federal actions taken as a result of an agency decision which permits an action by other parties which will affect the quality of the human environment. Scientists' Institute for Public Information, Inc. v. A.E.C., 156 U.S.App.D.C. 395, 481 F.2d 1079 (1973). Nowhere is the evolution of the concept of major federal action more complete than in the Tenth Circuit. Wyoming Outdoor Coordinating Council v. Butz, 484 F. 2d 1244 (C.A. 10, 1973); Davis v. Morton, *supra*; National Helium Corporation v. Morton, *supra*. These cases hold and reflect that N.E.P.A. is intended to interrupt business-as-usual and to affect the decision-making process at the lowest agency level. N.E.P.A., with its unequivocal command to implement its policy, "to the fullest extent possible" does not render the procedural requirements discretionary. Calvert Cliffs' Coordinating Committee v. A.E.C., *supra;* Ely v. Velde, 451 F.2d 1130 (C.A. 4, 1971).

The decision of the Interstate Land Sales Office to either approve or suspend or to ascertain that deficiencies exist, or have been corrected, in the Statement of Record or Property Report, is major federal action. The case of Davis v. Morton, *supra*, together with the cases cited therein, hold that major federal action exists when the only action was approval by the Government of a project, licensing, permitting a project or enterprise or abandoning a railroad line.

In the *Davis* case the sole federal action involved was an approval, under a delegation of powers, or a lease of Indian lands by a local Department of Interior official.

5. Where a federal license or permit is involved, or where Congress possesses and has utilized its plenary power of regulation under the Interstate Commerce Clause, or other Constitutional authority, federal approval constitutes major federal action. The approval of a filing under the Interstate Land Sales Act is in the nature of a federal license or permit, for without the approval it is unlawful to engage in sales and Congress has exercised its plenary power under the Interstate Commerce Clause by enacting the Interstate Land Sales Act.

6. The National Environmental Policy Act compels Federal agencies to review and reappraise existing policies and procedures in light of developing law and in light of developing agency awareness of environmental factors, 42 U.S.C. § 4332. "The Sweep of N.E.P.A. is extraordinarily broad, compelling consideration of any and all types of environmental impact on federal action," Calvert Cliffs' Coordinating Committee v. A.E.C., *supra.*

7. Plaintiffs must establish an overriding public interest in the preservation of the character of the area under concern and that there is a threat of environmental injury without compliance of N.E.P.A.'s procedures. Wyoming Outdoor Coordinating Council v. Butz, *supra*; Calvert Cliffs' Coordinating Committee v. A.E.C., *supra.* The Court concludes as a matter of law that the plaintiffs have met this burden.

8. One of the burdens of plaintiffs is to demonstrate either actual or potential or threatened results that will significantly affect the quality of the human environment. Wyoming Outdoor Coordinating Council v. Butz, *supra*. The Court further concludes that it is one of the purposes of the National Environmental Policy Act to determine with more exactitude what the actual or potential environmental impacts would be and to take steps to minimize or prevent both long-range and short-range impacts. The Court finds as a matter of law that the plaintiffs have met this burden.

9. As a general rule these impacts include, but are not limited to, effects upon the depth or course of stream, plant life, wildlife habitats, fish and wildlife, soil, the air, the quality of water, social and economic impacts, and effects upon esthetics and recreational opportunities. Natural Resources, Inc. v. Grant, *supra*. The Court notes from its findings of fact and conclusions of law that the plaintiffs have demonstrated actual and potential environmental effects in all of these areas, and therefore, that the decision to approve the Statement of Record and Property Report by H.U.D. of Flint Ridge Development Co. is a major federal action which "significantly affects the quality of the human environment."

10. The Court further concludes, as a matter of law, that any attorney fees and costs to be assessed against the defendant, United States of America, or

the Flint Ridge Development Co. shall be heard and considered upon proper application after the action of this Court has become final or after a final Order of any appellate court.

An appropriate Order and Judgment will be entered accordingly herein.

ORDER, JUDGMENT AND DECREE

Based upon the Findings of Fact and Conclusions of Law this day filed, it is the order, judgment and decree of this court that:

1. The Department of Housing and Urban Development and the Office of Interstate Land Sales be, and they are hereby enjoined and restrained from approving the Interstate Land Sales filing of Flint Ridge Development Co. until such time as the environmental impact study has been prepared and a public hearing held thereon, and further the Department of Housing and Urban Development and the Office of Interstate Land Sales of that Department are hereby ordered to immediately withdraw the approval of the Flint Ridge Development Co. filing which was effective May 2, 1974, and not to reinstate said approval until the further Order of this Court.

2. Plaintiff will post bond in the amount of $100.00.

3. The Department of Housing and Urban Development of the United States Government shall conduct a full, thorough and complete environmental impact study of the effects of the Flint Ridge de-

velopment on the quality of the human environment and that they specifically and in detail address themselves to the following:

(a) The environmental impact of the proposed actions;

(b) Any adverse environmental effects which cannot be avoided should the proposal be implemented;

(c) Alternatives to the proposed action, including no action;

(d) The relationship between the local short-term uses of man's environment and the maintenance and the enhancement of long-term productivity;

(e) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The Department of Housing and Urban Development is further ordered to consult with, and obtain the comments of, any and all other federal agencies which have jurisdiction by law or special expertise with respect to any environmental impact involved.

4. Upon completion of the impact study, a copy thereof shall be filed with this Court.

5. The environmental impact statement shall be made available to the President of the United States, the Council on Environmental Quality and to the public as provided by Title 5 U.S.C. § 552 and Title 42 U.S.C. § 4332(C).

6. The injunction and restraining order set out in paragraph 1 hereof shall be administered by James

T. Lynn, Secretary of Housing and Urban Development and his successor and by George K. Bernstein, Administrator of Interstate Land Sales, Department of Housing and Urban Development and his successor. That a certified copy of this Order shall be served by registered mail upon James T. Lynn and George K. Bernstein at HUD Building, 451 Seventh Street, S.W., Washington, D.C. 20410.

7. It is specifically Ordered that the property report and statement of record filed by Flint Ridge Development Company, a joint venture, be, and the same are hereby suspended, vacated and held for naught, and no further public sales shall be conducted thereunder unless and until further Order of the Court.

A certified copy of this Order shall be delivered by registered mail to Flint Ridge Development Company c/o F. Paul Thieman, Jr., Attorney, 5800 East Skelly Drive, Tulsa, Oklahoma 74135.

APPENDIX D

Sections 102-105 of the National Environmental Policy Act of 1969, 83 Stat. 853-854, 42 U.S.C. 4332-4335, provide as follows:

> SEC. 102 [42 U.S.C. 4332]. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—
>
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

SEC. 103 [42 U.S.C. 4333]. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

SEC. 104 [42 U.S.C. 4334]. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of en-

vironmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

SEC. 105 [42 U.S.C. 4335]. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

The Interstate Land Sales Full Disclosure Act, 82 Stat. 590 *et seq.*, as amended, 15 U.S.C. 1701 *et seq.*, provides in pertinent part:

PROHIBITIONS RELATING TO THE SALE OR LEASE OF LOTS IN SUBDIVISIONS

SEC. 1404 [15 U.S.C. 1703]. (a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—

(1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1407 and a printed property report, meeting the requirements of section 1408, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser;

* * * * *

REGISTRATION OF SUBDIVISIONS

SEC. 1405 [15 U.S.C. 1704]. (a) A subdivision may be registered by filing with the Secretary a statement of record, meeting the require-

ments of this title and such rules and regulations as may be prescribed by the Secretary in furtherance of the provisions of this title. A statement of record shall be deemed effective only as to the lots specified therein.

(b) At the time of filing a statement of record, or any amendment thereto, the developer shall pay to the Secretary a fee, not in excess of $1,000, in accordance with a schedule to be fixed by the regulations of the Secretary, which fees may be used by the Secretary to cover all or part of the cost of rendering services under this title, and such expenses as are paid from such fees shall be considered non-administrative.

(c) The filing with the Secretary of a statement of record, or of an amendment thereto, shall be deemed to have taken place upon the receipt thereof, accompanied by payment of the fee required by subsection (b).

(d) The information contained in or filed with any statement of record shall be made available to the public under such regulations as the Secretary may prescribe and copies thereof shall be furnished to every applicant at such reasonable charge as the Secretary may prescribe.

INFORMATION REQUIRED IN STATEMENT OF RECORD

SEC. 1406 [15 U.S.C. 1705]. The statement of record shall contain the information and be accompanied by the documents specified hereinafter in this section—

(1) the name and address of each person having an interest in the lots in the subdivision to be covered by the statement of record and the extent of such interest;

(2) a legal description of, and a statement of the total area included in, the subdivision and a statement of the topography thereof, together with a map showing the division proposed and the dimensions of the lots to be covered by the statement of record and their relation to existing streets and roads;

(3) a statement of the condition of the title to the land comprising the subdivision, including all encumbrances and deed restrictions and covenants applicable thereto;

(4) a statement of the general terms and conditions, including the range of selling prices or rents at which it proposed to dispose of the lots in the subdivision;

(5) a statement of the present condition of access to the subdivision, the existence of any unusual conditions relating to noise or safety which affect the subdivision and are known to the developer, the availability of sewage disposal facilities and other public utilities (including water, electricity, gas, and telephone facilities) in the subdivision, the proximity in miles of the subdivision to nearby municipalities, and the nature of any improvements to be installed by the developer and his estimated schedule for completion;

(6) in the case of any subdivision or portion thereof against which there exists a blanket encumbrance, a statement of the consequences for an individual purchaser of a failure, by the person or persons bound, to fulfill obligations under the instrument or

instruments creating such encumbrance and the steps, if any, taken to protect the purchaser in such eventuality;

(7) (A) copy of its articles of incorporation, with all amendments thereto, if the developer is a corporation; (B) copies of all instruments by which the trust is created or declared, if the developer is a trust; (C) copies of its articles of partnership or association and all other papers pertaining to its organization, if the developer is a partnership, unincorporated association, joint stock company, or any other form of organization; and (D) if the purported holder of legal title is a person other than developer, copies of the above documents for such person;

(8) copies of the deed or other instrument establishing title to the subdivision in the developer or other person and copies of any instrument creating a lien or encumbrance upon the title of developer or other person or copies of the opinion or opinions of counsel in respect to the title to the subdivision in the developer or other person or copies of the title insurance policy guaranteeing such title;

(9) copies of all forms of conveyance to be used in selling or leasing lots to purchasers;

(10) copies of instruments creating easements or other restrictions;

(11) such certified and uncertified financial statements of the developer as the Secretary may require; and

(12) such other information and such other documents and certifications as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers.

TAKING EFFECT OF STATEMENTS OF RECORD AND AMENDMENTS THERETO

SEC. 1407 [15 U.S.C. 1706]. (a) Except as hereinafter provided, the effective date of a statement of record, or any amendment thereto, shall be the thirtieth day after the filing thereof or such earlier date as the Secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the consent of the Secretary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidated statement of record any material changes in the information contained in the earlier statement.

(b) If it appears to the Secretary that a statement of record, or any amendment thereto, is on its face incomplete or inaccurate in any material respect, the Secretary shall so advise

the developer within a reasonable time after the filing of the statement or the amendment, but prior to the date the statement or amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statement or the amendment until thirty days after the developer files such additional information as the Secretary shall require. Any developer, upon receipt of such notice, may request a hearing, and such hearing shall be held within twenty days of receipt of such request by the Secretary.

(c) If, at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement, the developer shall promptly file an amendment thereto. Upon receipt of any such amendment, the Secretary may, if he determines such action to be necessary or appropriate in the public interest or for the protection of purchasers, suspend the statement of record until the amendment becomes effective.

(d) If it appears to the Secretary at any time that a statement of record, which is in effect, includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in accordance with

such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

(e) The Secretary is hereby empowered to make an examination in any case to determine whether an order should issue under subsection (d). In making such examination, the Secretary or anyone designated by him shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the developer, any agents, or any other person, in respect of any matter relevant to the examination. If the developer or any agents shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of an order suspending the statement of record.

(f) Any notice required under this section shall be sent to or served on the developer or his authorized agent.

INFORMATION REQUIRED IN PROPERTY REPORT

SEC. 1408 [15 U.S.C. 1707]. (a) A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record, and any amendments thereto, as the Secretary may deem necessary, but need not include the documents referred to in paragraphs (7) to (11), inclusive, of section 1406. A property report shall also contain such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers.

(b) The property report shall not be used for any promotional purposes before the statement of record becomes effective and then only if it is used in its entirety. No person may advertise or represent that the Secretary approves or recommends the subdivision or the sale or lease of lots therein. No portion of the property report shall be underscored, italicized, or printed in larger or bolder type than the balance of the statement unless the Secretary requires or permits it.

* * * * *

UNLAWFUL REPRESENTATIONS

SEC. 1417 [15 U.S.C. 1716]. The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean the Secretary has in any way passed upon the merits of, or given approval to, such subdivision. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing.

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No. 75-545

In the Supreme Court of the United States

OCTOBER TERM, 1975

CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,
Petitioners,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

ANSWER TO PETITION OF CARLA A. HILLS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents, The Scenic Rivers Association of Oklahoma and the Illinois River Conservation Council, respectfully pray that this Court deny the Petitioners' request for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

I
STATEMENT OF THE CASE

The Statement of the Case is incomplete and partially inaccurate. To begin, the Court of Appeals for the Tenth Circuit, as well as the District Court, ruled that the environmental impact statement is a requirement

when there is major federal action *which substantially affects the quality of the human environment.*

On p. 3 of the Government's Petition, the statement is made that the Interstate Land Sales Act (ILSA) was made to protect potential buyers by requiring the developer to make certain disclosures. The Interstate Land Sales Act reflects that the Act is much broader and that it includes protection of the *public interest* as well as for for potential buyers. See for example 15 U.S.C. § 1706(a)(c)(d) and § 1707 (a) and 24 C.F.R. 1710.105, 1710.110 and 1710.80.

The true facts of the case are that the Flint Ridge development will actually or potentially result in the complete destruction of the Illinois River Basin. There will be substantial effects on the quality of the human environment in all of its aspects. The river is a State designated scenic river and is included for study in the National Wild and Scenic Rivers System, the study having formally begun October 10, 1975. The evidence presented at trial clearly established, and it is uncontroverted on appeal to this very day, that as a result of this development, there will be adverse effects on the Illinois River and its basin and also upon the course and depth of the river and its tributaries and drainage area, the plant life, the wildlife habitats, fish and wildlife, soils, air, esthestics of the area and upon the socio-economic conditions of the area, including such matters as health,

hospital care and facilities, roads and highways, schools, and police and fire protection (Trial Court's Finding No. 14, R. p. 689).

The Federal Government simply refuses to comply with the National Environmental Policy Act (NEPA)—a serious dereliction of duty according to the Trial Court (Finding No. 13, R. p. 69).

II

SUMMARY OF ARGUMENT

1. There will be no administrative burden; and, in any event, this is a matter which should be addressed to Congress.

In some cases a filing may have predated NEPA; in some cases a project may have been abandoned; in some cases, after environmental review, it may be determined that there is no substantial effect on the quality of the human environment. HUD, unlike SEC, has both a handbook and proposed regulations for implementing NEPA and must follow them. The Office of Interstate Land Sales is not exempt. It is neither impossible nor is HUD prohibited by specific statute from complying with NEPA in the administration of ILSA.

2. It does not foster the purposes of NEPA or make any sense to find federal action minor when the environmental effects of agency action, or action it permits private parties to take, are substantial.

Major federal action is a mixed question of law and fact. One test for major federal action is whether, as a result of federal action, a private party is permitted to undertake environmental degradation; and, if so, such action is major.

3. The Securities and Exchange Commission is not involved.

. It has failed in its attempt to evade NEPA and is now making long overdue rules for compliance with the National Environmental Policy Act.

4. Petitioner has failed to promote any of the considerations contained in Rule 19 of the Rules of the United States Supreme Court.

III

REASONS WHY WRIT SHOULD NOT BE GRANTED

1. There is no crushing administrative burden as a result of this case or any other. Nevertheless, the National Environmental Policy Act has for its goals higher values than administrative ease.

HUD argues that because of the volume of filings HUD "could" (a significant "could") be required to prepare environmental impact statements upon a number of developments. This issue was not raised in the Trial Court and was not urged on appeal. In any event the concern of HUD with respect to the administrative problems has been rejected time and time again by all

Federal Courts. *Calvert Cliffs Coordinating Committee v. A.E.C.* (C.A.D.C., 1971) 449 F.2d 1109 and its progeny have laid this argument to rest. These cases demand compliance with NEPA except where prohibited by specific statutes or impossibility. Neither situation obtains here. In all events, it must be recognized that in some cases the filing may have predated NEPA; in some cases the project may have been abandoned; and perhaps in some cases (after initial environmental review) it would be determined that there is no substantial effect on the quality of the human environment.

Secondly, NEPA requires innovative procedures. The legislative history of NEPA instructs us that "no agency shall utilize an excessively narrow construction of its existing statutory authorization to avoid compliance." The history further indicates that the phrase "to the fullest extent possible" is not to be used by *any* Federal agency as a means of avoiding compliance with the directives set out in NEPA. 2 U.S. Code Cong. & Adm. News 1969, p. 2770.

The argument of administrative burden further runs counter to the specific provisions of NEPA itself. For example, § 102(B) of NEPA requires Federal agencies to readjust their procedures, policies and thinking so as to comply with NEPA. As stated by the Council on Environmental Quality, the Act is a mandate to be innovative. See, C.E.Q. Third Annual Report to Congress.

Section 101(b) of NEPA orders the Government to use all practicable means to "improve and coordinate Federal plans, functions, programs and resources" to comply with NEPA's principles and policies.

The argument is not dissimilar to that proposed in situations in which environmental protection agencies are involved. Mr. Anderson, in his book *NEPA in the Courts,* on p. 119, discusses answers to the "helpless" theories of the Government. He notes that even if the administrator must act quickly, or even if he has no discretion, impact statements can still serve the useful purpose of informing the public, the Executive Branch and the Congress of environmental impacts so that future remedies may be fashioned and discussed. Without NEPA the agency might well be reluctant to spell out the unavoidable risks and negative consequences of a proposed action. Finally the discussion of alternatives, which the administrator may in fact be helpless to implement, allows him to stimulate informed debate on future legislative needs. Although HUD has been required to formulate rules, it has not done so and is currently operating under what it terms HUD Handbook 1390.1 as the method for implementation of NEPA. It does have proposed rules which may be found at 39 F.R. No. 37, Part III, February 22, 1974. Pertinent portions of the Handbook are reproduced herein. (Appendix "B")

The Courts require federal agencies to follow their own guidelines and manuals in the implementation of their mandate under NEPA. *National Helium Corporation v. Morton* (C.A. 10, 1971) 455 F.2d 650; *Scherr v. Volpe* (D.C. Wis., 1971) 336 F. Supp. 882 affirmed 466 F.2d 1027. It is quite significant to note that in Chapter 2, § 5(a)(1) of the Handbook certain exemptions from the general HUD policy for environmental clearances are set forth. The Interstate Land Sales Office is *NOT* exempted. A section provides "EXCEPT FOR THESE EXEMPTIONS ALL HUD ACTIONS MUST UNDERGO ONE OR MORE ENVIRONMENTAL CLEARANCES." To the same effect see Proposed Rules §50(a)(3). Both the rules as proposed and the Handbook speak of an environmental impact in terms of "any alteration of environmental conditions, adverse or beneficial, *caused* or *induced* by the action, or set of actions, under consideration". 24 C.F.R. Part 50, §§ 50.3, 39 F.R. 6816 and Appendix D thereof; HUD Handbook 1390.1, Chapter 1, Section 2(d). The Handbook and the rules both suggest that major controversy concerning the existing or potential environmental effects is a factor used by HUD to extend its evaluation of environmental consequences. In the case before this Court we have more than a controversy—we have unappealed from judicial determinations of actual and potential affects upon the environment—all adverse.

To the argument that they will have to do environmental impact statements on each and every development, we can only point out that HUD provides threshholds below the magnitude of the Flint Ridge project. Some projects may require full environmental clearances and others lesser reviews. In all events, the nature and extent of the other numerous filings is not at issue before this Court nor was it in issue before the lower courts hearing this case.

Again, both the Handbook and the proposed rules provide for the conditioning of authorization upon compliance with environmental safeguards. Handbook 1390.1, Chapter 1, § 3(b); Proposed Rules 50.11(h)(2), 39 F.R. 6819. HUD may reject the matter if the environmental impacts are unacceptable, even after modification. Handbook 1390.1, Chapter 2, § 5(b)(1); Proposed Rules § 50.14(5)(d), 39 F.R. 6822.

The Handbook, in Chapter 1, §§ 3(a) and 3(b), instructs HUD officials to work with the applicant to suggest changes, to receive proposals, etc., all designed to prevent or minimize adverse environmental consequences. The same instructions are contained in Chapter 2, B 5(a)(7) of the Handbook and in the Proposed Rules § 50.11(h), 39 F.R. 6819.

It should be pointed out that the Handbook sets up a mechanism in Chapter 2, Section 5(a)(7) whereby the

applicant submits the basic yet detailed environmental information. The format for this submission is contained in the Appendix C-1 to the Handbook. In the Proposed Rules it is called ECO Form 1 (See p. 412 of the Transcript where Mr. Weaver, an official of HUD, testified that he did not know whether HUD could compel a developer to submit an environmental impact statement).

Nor may administrative inconvenience rest upon the premise of a 30-day "effective" date. Over 90 percent of the statements are not effective within the 30-day period because of suspension notices. Robert Chasnow, "COMPLIANCE WITH NEPA IN INTERSTATE LAND SALES" *Urban Land Journal* May, 1975, pp. 12 & 13. Simply incorporating existing regulations which provide environmental evaluation procedures, would involve a situation, therefore, in which the statement of record would be incomplete without the full explanation of the environmental consequences and a suspension notice would stop the 30-day period.

The developer could prefile with the Interstate Land Sales Office a notice of intent to file the statement of record. This notice of intent, a procedure used by many other agencies, would initiate the environmental review process and provide ample time to review the environmental consequences. On p. 14, footnote 11, the suggestion was made by Petitioner that HUD could not comply

in this manner. The premise seems to be that the agency could not begin to examine the environmental consequences until the sales began. This is utter nonsense and would be the same as saying that the Corps of Engineers could not examine the environmental merits or demerits of a proposed dam until the dam was built. Furthermore, HUD's own regulation, under the Interstate Land Sales Act, § 1710.105, provides for broad and extensive disclosures and information as may be necessary for protection of purchasers or the public interest. [1]

Of course, there is another reason for preparing the environmental review, which is in no small way important, and this is that the environmental degradation imposed by the development then becomes a matter of public information and disclosure. See *N.R.D.C. v. S.E.C.* (D.C.D.C., 1974) 389 F. Supp. 689 and discussion therein of "ethical investors."

The Petitioner makes the querulous complaint that

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[1] "24 C.F.R. Sec. 1710.45(b)(i). As to the 'not misleading' requirement, see Instruction A(2) of the Instructions for Completion of the Statement of Record. *24 C.F.R. Sec. 1710.105*, which requires that

> 'in addition to the information expressly required to be stated in the statement of record, there shall be added such further material information, documentation and certification, *if any, as may be necessary in the public interest and for the protection of purchasers or necessary in order to make the statements in the light of the circumstances under which they are made, not misleading.*'" (Emphasis added) See also proposed Rule 50.11(i), Appendix C, p. 24a, *infra*.

the decision has implications for other Federal agencies. For example, they refer to the problems that may be encountered by the Securities and Exchange Commission. The Securities and Exchange Commission had its problems and lost the case of *N.R.D.C. v. S.E.C.* (D.C.D.C. 1974) 389 F. Supp. 689.

> "Superimposed upon this grant to the SEC of broad rulemaking authority is the Congressional mandate to the federal agencies which is contained in NEPA; that is, NEPA gives specific content to the SEC's authority under the securities laws to require disclosure of information 'in the public interest'. As analyzed in *Calvert Cliffs' Coordinating Comm. v. AEC,* 449 F.2d 1109 [2 ERC 1779] (D.C. Cir. 1971), the procedural requirements of NEPA § 102, 42 U.S.C. § 4332, must be carried out 'to the fullest extent possible'. These procedural requirements are, inter alia: (1) that 'policies, regulations, and public laws of the United States shall be interpreted and administered' in accordance with NEPA policies; and (2) that 'all agencies of the Federal Government shall— . . . (F) Make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment.' Thus, Congress has directed the SEC and this Court to interpret the securities laws *to the fullest extent possible* in accordance with the overriding Congressional mandate of NEPA to protect and enhance the Nation's environment. Specifically, *Congress* has determined that the dissemination of information to governmental units, institutions, and

interested individuals, can aid the purposes of NEPA." (emphasis added)

The S.E.C. has not appealed from this decision and therefore must feel that they will be able to comply with NEPA in the spectrum of their activities. Furthermore, the S.E.C. has or is conducting public hearings to determine how it shall fully comply with the National Environmental Policy Act.

2. The lower courts have not misread §102(2)(C) of NEPA.

Let us not overlook the fact that we are talking about "major federal action significantly affecting the quality of the human environment."

HUD's refrain throughout this protracted evasion of its duties under NEPA is that it made no recommendation or report on proposals for legislation, but it DOES NOT DENY THAT it *took action* (permitting an interstate land sales filing to become effective) and cannot now challenge a finding of fact that this led to a substantial adverse effect on the quality of the human environment. Nor can HUD ignore that Section 102(2)(C) of NEPA includes such action, and in fact HUD admits that its own regulations 24 C.F.R. 1710.105 and 1710.110 require some disclosure of environmental information. The incredible and destructive irony of HUD's attitude is reflected by its letter of March 7, 1974, in which the administrator of the OILSR said:

> "In July, 1973, Secretary Lynn promulgated policy contained in 1390.1, A Handbook of Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality. Disclosure filings required by the Interstate Land Sales Full Disclosure Act are not considered federal actions for purposes of compliance with the National Environmental Policy Act and implementing regulations."

The cold, undisguised truth is that HUD's own handbook gives the lie to its claims. ***HUD has already made a determination that NEPA applies to interstate land sales filings.*** (Handbook 1390.1, 38 FR 19182, July 18, 1973, 39 FR 38922 Nov. 4, 1974).[2]

HUD's position throughout this entire case is

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[2] This Handbook was promulgated in response to NEPA's directive that the Federal Government use all practicable means to implement national environmental policy. One of the main tools for compliance is the EIS. The Handbook sets forth HUD policy and delineates the procedure which all HUD agencies will follow in arriving at the determination as to if and when an EIS is to be prepared. Chapter 2, Part 5(a)(1), of the Handbook lists all HUD activities which are exempt from the requirements of the Handbook. There are three complete exemptions ("an individual action on a one-to-four family dwelling, training grants, individual rehabilitation grants"), and two partial exemptions which concern emergency disaster relief programs. Following the enumerated exemptions is the statement, ***"Except for these exemptions, all HUD actions must undergo one or more environmental clearances."*** OILSR activities, therefore, would be included in the category which is subject to the HUD procedure of environmental clearance. That procedure consists of a three-tier review of all actions including individual project actions, legislation, regulations, and all policy documents.

summed up in the letter from HUD in which the agency refused to comply with NEPA. (Reproduced as Appendix A) Now for the first time HUD interjects the second argument for granting a writ of certiorari.

HUD overlooks the most significant part of NEPA in which environmental reviews are mandated for "major federal actions which significantly affect the quality of the human environment". The latter portion of that requirement is uncontroverted here, in the Circuit Court and was uncontested by HUD in the Trial Court. In fact for all practical purposes significant degradation by this (and other) developments has been admitted by HUD. See, Fifth Annual Report to Congress, Council on Environmental Quality, pp. 21-26, 489-490. (Appendix E)

There is, therefore, major federal action in this case for the following reasons:

1. It makes no sense to find federal action minor when the effect of the action is substantial. Given the admission that the effect of the action is substantial there is, therefore, major federal action. *Minnesota Public Interest Research Group v. Butz* (C.A. 8, 1974) 498 F.2d 1314; *National Forest Preservation Group v. Butz* (C.A. 9, 1973) 485 F.2d 408; *Simmans v. Grant* (S.D. Tex., 1974) 370 F.Supp. 5; *Wyoming Outdoor Coordinating Council v. Butz* (C.A. 10, 1973) 484 F.2d 1244.

2. The question of federal action is a mixed question

of law and fact and, to the extent that facts have been found by the Trial Court to substantiate major federal action, those facts are binding on this Court. *Rucker v. Willis* (C.A. 4, 1973) 484 F.2d 158; *Wyoming Outdoor Coordinating Council v. Butz* (C.A. 10, 1973) 484 F.2d 1244.

3. As the concept of federal action has evolved, one test for federal action is whether, as a result of the federal action, a private party is permitted to undertake environmental degradation, then such action is major. *Minnesota Public Interest Research Group v. Butz* (C.A. 8, 1974) 498 F.2d 1314; *National Forest Preservation Group v. Butz* (C.A. 9, 1973) 485 F.2d 408; *Simmans v. Grant* (S.D. Tex., 1974) 370 F. Supp. 5.

4. When an agency exercises jurisdiction based upon the plenary power of Congress to act under Constitutional authority, such action is per se major federal action. *Davis v. Morton* (C.A. 10, 1972) 469 F.2d 593.

The Trial Court made numerous findings of facts supporting the conclusion that there was major federal action, and that there was a substantial effect upon the quality of the human environment. These findings are, of course, binding upon this Court. *Wyoming Outdoor Coordinating Council v. Butz* (C.A. 10, 1973) 484 F.2d 1244. The question of whether an action is major federal action is one involving factual determinations. *Rucker v. Willis* (C.A. 4, 1973) 484 F.2d 158.

As found by the Trial Court, the development may destroy forever the environmental quality of the Illinois River Basin and it will have actual effect upon the depth and course of the river, its tributaries, drainage areas, etc. The Trial Court made findings both as to *actual* and *potential* effects upon the quality of the human environment. The Trial Court also made findings with respect to the scope of the project and other activities associated with the quality of the human environment and the scope of the effect of the action taken by H.U.D. in this case.

The principal thrust of HUD's argument seems to be that there is no federal action because H.U.D. does not finance, plan, etc., development. HUD also suggests that H.U.D., being a regulatory agency in the context of I.L.S.A., simply does nothing more than regulate, and therefore the concept of regulation of itself does not constitute major federal action. It is quite clear from the following cases that the determination of whether there is "major federal action" has evolved substantially from the rather simplistic approach taken by the Court in *N.R.D.C. v. Grant* (E.D.D.C., 1972) 341 F. Supp. 356. Even so, Judge Bohanon made findings which were totally consistent with the N.R.D.C. case.

At the outset, it must be recognized that all Courts accept the view that the federal agencies, under the "to

the fullest extent possible" mandate of N.E.P.A., must strictly comply with the mandates of the Act. The leading case is the *Calvert Cliffs* decision. The *Wyoming Outdoor Coordinating Council v. Butz,* decision, supra, referred to the Act's mandatory requirements and high standards. As a result of these and other decisions, N.E.P.A. is now recognized as an act which imposes a duty on *every* federal agency to consider the effects of *each decision* upon the environment and to use *all* practicable means to avoid environmental degradation. In his book, *N.E.P.A. in the Courts,* Mr. Anderson states:

> "If low-level activities were exempted, one of Congress' main purposes in enacting the statute would fail to be achieved. Yet NEPA's legislative history shows that Congress intended to interrupt business-as-usual and affect decision making at the lowest agency levels." (P. 74)

The Act provides ways and means to identify the effects and imposes procedural duties, duties which are *not* inherently flexible, to insure compliance with the Act.

Government agencies have sought to avoid the effect of N.E.P.A. on the grounds that their acts are nondiscretionary. This argument was thoroughly rejected in the case of *Ely v. Velde* (C.A. 4, 1971) 451 F.2d 1130. The Circuit Court employed the same reasoning in rejecting a similar assumption in *Davis v. Morton,* supra.

Federal agencies have also sought to avoid com-

pliance with N.E.P.A. on the theory that it is not the federal agency which is affecting the environment, but it is a private enterprise which will ultimately engage in the harmful environmental activities. This is, of course, exactly what FLINT RIDGE is doing and, therefore, H.U.D. has no authority or reason for not doing an environmental impact statement.

This rationale has also been rejected time and again by the Courts.

In *Scientists' Institute for Public Information v. A.E.C.* (C.A.D.C., 1973) 481 F.2d 1079. The A.E.C. had begun a technology research program and at issue was whether N.E.P.A. applied to such program. On p. 1088 of the Opinion, the Court stated that there was major federal action within the meaning of the statute not only when the agency proposes to build a facility itself, but whenever an agency makes a decision *which permits action by other parties which will affect the quality of the human environment.* In that case the development of technology would have allowed utilities to build nuclear power facilities.

Simmans v. Grant (S.D. Tex., 1974) 370 F. Supp. 5 clearly supports the position of Respondents. The Court noted that the issues as to whether a project is major or involves significant impact are not necessarily unrelated. In other words, the mere size of a federal in-

volvement does not necessarily exempt the federal involvement from N.E.P.A. if its environmental effects are significant:

> "To a great extent the determination of whether a project is major, relies upon the inquiry in whether the federal action, *whatever it may be, is the precipitating cause of the resultant environmental impact regardless of who or what may actually have caused the impact. If but for* the federal action, the impact would not have resulted, then the federal action might be found to be major." (Emp. added).

The case of *Minnesota Public Interest Research Group v. Butz* (C.A. 8, 1974) 498 F.2d 1314, succinctly discusses the concept of major federal action. We cannot improve on the language of the Court which is:

> *"To separate the consideration of the magnitude of Federal action from its impact on the environment does little to foster the purposes of the act,* i.e. to 'attain the widest range of beneficial uses of the environment without degradation, risk to health and safety, or other undesirable and unintended consequences.' *By bifurcating the statutory language, it would be possible to speak of a 'minor federal action significantly affecting the quality of the human environment,' and to hold N.E.P.A. inapplicable to such action. Yet if the action has a significant effect, it is the intent of N.E.P.A. that it should be the subject of detailed consideration mandated by N.E.P.A.; the activities of Federal agencies cannot be isolated from their impact upon the environment.* This approach is more consonant with the purpose

of N.E.P.A. as supported in S. Rep. 91-296, supra, and the C.E.Q. Guidelines." (Emp. added).

National Forest Preservation Group v. Butz (C.A. 9, 1973) 485 F.2d 408 is a case involving an exchange of lands by the Forest Service with a private developer. Although there was a degree of compliance with N.E.P.A., the Court stated, in its decision holding N.E.P.A. applicable,

> "We do not 'doubt' that N.E.P.A. applies to this massive land exchange. *While the Federal Defendants are not themselves planning to take action 'significantly affecting the quality of the human environment,' 42 U.S.C. § 4332(c), the private Defendants plan such action, and the exchange is an act without which such action could not be taken.* The land exchange is thus analogous to the licensing of, or granting of, federal funds to a nonfederal entity to enable it to act. Such Federal 'enablement' has consistently been held to be subject to N.E.P.A. . . . [Citations omitted] . . . *Nor would compliance with N.E.P.A. be excused by the ignorance of the Federal authorities prior to the exchange of the plans the private party may have for the land he will receive.* The short answer is that Congress had imposed an affirmative duty on the Federal party to the exchange to receive assurances of the plans of the private developer prior to the exchange." (Emp. added).

See also *Conservation Society of Southern Vermont v. Volpe* (D.C. Vt., 1972) 343 F. Supp. 761, and *Citizens for Reid State Park v. Laird* (D.C. Me., 1972) 336 F. Supp. 783.

The actual argument made by H.U.D. in this case has been specifically rejected in *Davis v. Morton* (C.A. 10, 1972) 469 F.2d 593.

HUD's interpretation of *Aberdeen & Rockfish R. Co. v. SCRAP,* ___ U.S. ___, ___ S.Ct. ___, 45 L.Ed 2d 191 (1975) is incomplete and disingenious when used to support the argument that only where a federal agency makes a recommendation or report on a proposal for major federal action is an environmental impact statement required. (SCRAP II). The true holding is, "NEPA does create a discreet (sic) procedural obligation on government agencies to give written consideration of environmental issues in connection with certain major federal actions . . . " And those are ones which have substantial effect on the environment, 45 L.Ed.2d 191, 214-215.

While making the argument that the Court below misunderstood ILSA (Petition pp. 11-14) HUD fails to disclose to this Court that ILSA itself, together with its implementing regulations provides for disclosures not only to protect the purchaser BUT ALSO the public, 15 USC §§ 1706(a)(c)(d); 1707(a) and 24 C.F.R. 1710.110, 1700.80, 1710.105, 1710.45.

With respect to the so-called time problem of 30 days, the same response is applicable as to administrative inconvenience. In fact such contentions by HUD are really restatements of the inconvenience argument.

3. The S.E.C. has been required to comply with NEPA.

Again, as to the S.E.C.'s involvement that issue has been judicially determined adversely to the S.E.C. and that agency appears to have taken steps to bring itself into compliance. Even so, if Congress desired to exempt the S.E.C. it may do so. To date it has not. See for example the Alaska Pipeline exemption, and sundry exemptions fashioned for the Environmental Protection Agency in connection with clean air and water laws.

4. There are no grounds to grant the petition for Writ of Certiorari.

The Circuit Courts are unanimous. The decision below is in full accord with the pronouncements of this Court. In short, HUD wholly fails to come within the considerations of Rule 19 of the Rules of the United States Supreme Court.

IV
CONCLUSION

The traditional reasons for this Court to accept a Petition for Writ of Certiorari do not exist. There is absolutely no Court of Appeals decision in conflict with another Court of Appeals on these issues. All cases are consistent in all respects. Nor are the decisions below in conflict with decisions of this Court.

Respondents have shown that there is no conflict, that NEPA has mandatory requirements superimposed upon the developmental mandates of the agencies and that the Federal action involved herein becomes major if for no other reason that because of the substantial effect on the quality of the human environment.

We, therefore, respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Andrew T. Dalton, Jr.
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Tulsa, Oklahoma 74105

James N. Khourie
2626 E. 21st Street
Tulsa, Oklahoma 74114

Counsel for Respondents

APPENDIX A

MAR 7 1974

Mrs. Sherrill Nilson
Chairman, Executive Committee
Illinois River Conservation Council
4214 South Whelling Avenue
Tulsa, Oklahoma 74105

Dear Mrs. Nilson:

Thank you for your letter of February 23, 1974, regarding the Interstate Land Sales Full Disclosure Act and provisions of the National Environmental Policy Act.

The Interstate Land Sales Full Disclosure Act is just that, a disclosure act that requires the disclosure of important facts about the land that are of concern to prospective purchasers. It does not give HUD authority to disapprove land developments as such.

In July 1973, Secretary Lynn promulgated policy contained in 1390.1, A Handbook of Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality. Disclosure filings required by the Interstate Land Sales Full Disclosure Act are not considered federal actions for purposes of compliance with the National Environmental Policy Act and implementing regulations.

Sincerely,
George K. Bernstein
George K. Bernstein
Interstate Land Sales Administrator

cc:	Bernstein	9230
	McDowell	9260
	Meeker	7100

Broun/Miller	8204		
Farbstein/ Halpern	10240	Heidermann	9262
Mitchell/ Elliott	10214	Sullivan	9264
Curry	10270	OILSR File	
Sauerbrunn	10150		
Race	10150		

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URBAN DEVELOPMENT

APPENDIX B

Department of Housing and Urban Development
Procedures for Protection and Enhancement
of Environmental Quality

Dept. Handbook 1390.1, 38 FR 19182 (July 18, 1973), amend. 39 FR 38922 (Nov. 4, 1974)

On October 20, 1972 (37 FR 22673) the Council on Environmental Quality published HUD Circular 1390.1, "Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality" implementing section 102(2)(C) of the National Environmental Policy Act of 1969 (P.L. 91-190). Although this Circular was issued as a draft on July 16, 1971, it was made effective immediately, pending issuance of final procedures.

The Department consulted with the Council on Environmental Quality on the procedures and considered comments from interested parties, including numerous Federal agencies. Major changes and improvements have been made, and the revised procedures are now being issued in the form of HUD Handbook 1390.1, "Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality." These new procedures will facilitate and promote the Department's implementation of the National Environmental Policy Act of 1969.

On May 2, 1973 (38 FR 10856) the Council on Environmental Quality published proposed revised guidelines on the preparation of environmental impact statements. These proposed guidelines provide that, after they are made effective, each Federal agency shall revise its procedures to respond to requirements imposed by the revised guidelines.

Since the Department's new procedures will substantially improve implementation of its environmental responsibilities and will soon be further revised to comply with the revised CEQ Guidelines, comment and public procedure would be unnecessary and contrary to the public interest and good cause exists for making HUD Handbook 1390.1 effective upon publication.

Interested parties are invited to submit written comments concerning the revised procedures to the Rules Docket Clerk, Office of the General Counsel, Room 10256, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410.

(Sec. 7(d), Department of HUD Act; 42 U.S.C. 3535(d); sec. 102(2), National Environmental Policy Act of 1969; 42 U.S.C. 4332(2))

JAMES T. LYNN
Secretary of Housing
and Urban Development.

[1390.1]

DEPARTMENTAL POLICIES, RESPONSIBILITIES AND PROCEDURES FOR PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

HUD STAFF

Approved June 11, 1973.

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DEPARTMENTAL POLICIES, RESPONSIBILITIES AND PROCEDURES FOR PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

CHAPTER I—General Policy and Responsibilities

1 *Purpose and authority.* The National Environment Policy Act of 1969 (P.L. 91-190) establishes new national policy, goals and procedures for protecting and enhancing environmental quality. The act, effective January 1,

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[1] Filed as part of the original document. See 83 Stat. 852, 42 U.S.C. 4321 note.

[2] Filed as part of the original document. See 35 FR 4247, March 7, 1970.

[3] Filed as part of the original document. See 36 FR 7724, April 23, 1971.

[4] Filed as part of the original document. See 37 FR 24146, November 14, 1972.

[5] Filed as part of the original document. See 36 FR 8921, May 15, 1971.

1970, establishes the Council on Environmental Quality to set overall policies to implement the Act.

The National Environmental Policy Act (NEPA) directs the Federal government to use all practicable means, including financial and technical assistance, to implement the national policy. NEPA governs all Federal departments and agencies and requires systematic attention to the environmental consequences of all Federal activities.

The purposes of this Handbook are to set forth departmental environmental policy, to assign responsibilities, and to provide procedural guidance to all headquarters and field offices for environmental clearances under NEPA. The Handbook applies to HUD legislative proposals, policy and guidance documents (including guides, regulations, handbooks, circulars, technical standards, etc.), and individual project approval actions on insurance, loans and grants, subsidies and demonstration projects.

This Handbook is based on authority provided in:

a. The Department of Housing and Urban Development (HUD) Act of 1965 (P.L. 89-174) which provides that the Secretary may make rules and regulations as may be necessary to carry out his functions, powers, and duties, and sets forth, as a matter of national purpose, the sound development of the Nation's communities and metropolitan areas;

b. The National Environmental Policy Act of 1969 (P.L. 91-190) which establishes a comprehensive policy for protection and enhancement of environmental quality by the Federal Government, creates the Council on Environmental Quality (CEQ) in the Executive Office of the President and directs Federal Agencies to carry out the purposes of this Act;

* * *

2. *Terminology*—a. *Environment.* Environment is not defined in NEPA or in the CEQ Guidelines. However, it is clear from section 102 of the Act and elsewhere that the term is meant to be interpreted broadly to include physical, social, cultural, and aesthetic dimensions. Examples of environmental considerations are: air and water quality, erosion control, natural hazards, land use planning, site selection and design, subdivision development, conservation of flora and fauna, urban congestion, overcrowding, displacement and relocation resulting from public or private action or natural disaster, noise pollution, urban blight, code violations and building abandonment, urban sprawl, urban growth policy, preservation of cultural resources, including properties on the National Register of Historic Places, urban design and the quality of the built environment, the impact of the environment on people and their activities.

b. *Major Federal actions significantly affecting the quality of the human environment.* Those actions taken by a Federal agency which require Environmental Impact Statements in accordance with section 102(2)(C) of the National Environmental Policy Act. As HUD processes between 15,000 and 20,000 applications per year at the project level, not including insurance actions on individual houses, the three level environmental clearance process defined in this Handbook shall be used to determine which action is a major Federal action significantly affecting the quality of the human environment.

c. *Significant environmental impact.* For the purposes of this Handbook, the term "significant environmental impact" is used to describe the consequences of an ac-

tion significantly affecting the quality of the human environment. This term is defined to some extent in paragraph 5 of the CEQ Guidelines, but the definition in general is a matter of discretion delegated to agency heads for formulation of guidelines subject to the approval of CEQ.

d. *Environmental impact.* An environmental impact is any alteration of environmental conditions or creation of a new set of environmental conditions, adverse or beneficial, caused or induced by the action or set of actions under consideration. Assessment of the significance of the environmental impact generally involves two major elements: A quantitative measure of magnitude and a qualitative measure of importance. Such a determination is a matter of agency judgment and consensus; at the project level, this judgment shall be governed by HUD environmental policies and standards.

e. *HUD environmental policies and standards:* National, Departmental, and program objectives, policies, standards, and procedures. These include: (1) National environmental goals and policies as expressed in the National Environmental Policy Act, other statutes and Executive Orders listed in paragraph 1 above, and guidelines issued by the Council on Environmental Quality; (2) Department-wide standards and policies such as HUD Circular 1390.2; and (3) environmental considerations contained in program policy and guidance documents, including environment-related project selection criteria, minimum property standards, and environmental elements of program circulars, handbooks and other issuances. Further clarification will be provided with the revision of program policies, procedures, standards and criteria and/or issuance of the consolidated office-wide circulars or handbooks of environmental policies and standards as

provided in paragraph 4.c. (2).

f. *Major amendatory.* For the purposes of this Handbook, a significant change in the nature, magnitude or extent of the action from that which was originally evaluated and which may have a significant affect on the quality of the human environment, such as an environmentally significant change in location or site, area covered, size or design in which case they require environmental clearance. An increase or decrease in cost is considered a major amendatory only when the increase or decrease reflects such an environmentally significant change in the project.

g. *Threshold.* A criterion of size or of environmental impact above which a Special Environmental Clearance is always required. The threshold is designed to screen out the more important HUD actions for special attention. HUD thresholds are set forth in Appendix A-1 of this Handbook.

h. *Decision points.* Those points of Federal commitment in the decision-making process before which prescribed environmental clearances must be completed. HUD decision points are set forth in Appendix A-1 of this Handbook.

i. *Finding of inapplicability (negative statement).* A determination by an authorized HUD official, under the authority of the HUD Guidelines approved by CEQ, which are issued in accordance with the CEQ Guidelines implementing NEPA, that no Environmental Impact Statement is required for the proposed HUD action under consideration. The Finding of Inapplicability for project level actions is a part of the Special Environmental Clearance. The format for the Finding of Inapplicability for policy actions is set forth in Appendix F.

* * *

3. *General policy.* The national goal of "a decent home and a suitable living environment for every American family"—established by the Housing Act of 1949 and subsequently reaffirmed by Congress in 1968—is central to the mission of the Department of Housing and Urban Development (HUD). *The National Environmental Policy Act (NEPA) furthers this goal. While recognizing that adverse environmental impacts are sometimes unavoidable in pursuing other goals, NEPA requires that environmental values be given appropriate consideration in decision-making along with economic and technical factors.* The object is to achieve the optimum balance among competing needs and goals—not to stop the building of cities, but rather to build with foresight so that rational development is achieved with due regard for the capacity of natural and man-made systems and for the quality of life attained within the resulting environment.

In addition to the prevailing national emphasis on anti-pollution and conservation aspects, HUD is also concerned with the environment of urban areas and how it affects the quality of life. Efforts to improve the quality of the environment certainly involve the abatement and prevention of many annoying and threatening nuisances—air pollution, water pollution, land pollution, noise—which impinge on our daily living. But efforts to improve environmental quality also include more positive actions such as provision of open space, the development of aesthetically pleasing urban areas, provision of adequate access to employment and cultural opportunities, reductions in structural deficiencies, maintenance of high quality in new construction, and appropriate planning for the proper juxtaposition of spaces for various human activities.

a. It is the policy of the Department to reject pro-

posals which have unacceptable environmental impacts, based on HUD environmental policies and standards, which cannot be avoided, and to encourage modification of project proposals or plans in order to enhance environmental quality and minimize environmental harm. At each stage of the environmental clearance HUD officials shall work with the applicant to seek means for avoiding adverse environmental impact, maximizing environmental quality, and considering superior alternatives.

b. When environmental clearances reveal conditions or safeguards which should be implemented once a project is approved in order to protect and enhance environmental quality or minimize adverse environmental impacts, such conditions or safeguards shall be set forth as requirements in the contract, grant, or other documents which delineate the obligations of the recipient. The contractor's performance in meeting such conditions shall be monitored and evaluated as part of the normal project monitoring and evaluation.

c. Environmental impact shall be evaluated on as comprehensive a scale as is feasible, with a view to the overall cumulative impact of HUD actions and programs, as well as the project specific impacts of a particular proposal. Environmental factors shall be considered as early as possible in the review and decision-making process.

d. Section 102(2)(A) of the National Environmental Policy Act directs all agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment." When making determinations regarding environmental impacts, HUD officials shall consult HUD professional

personnel, such as urban planners, landscape architects, civil engineers, sanitary engineers, architects, economists, demographers, sociologists, lawyers, and others who are qualified to provide advice on specialized and broad aspects of environmental concerns.

e. HUD officials shall continue to establish and review environmental policies, standards and procedures for administering HUD programs to promote environmental quality. HUD policies and procedures must be consistent with this Handbook.

* * *

CHAPTER 2—Environmental Clearances

5. *Environmental clearance policy on HUD actions.* The purpose of this section is to establish a procedure for determining whether a proposed HUD action is a "major Federal action significantly affecting the quality of the human environment", and whether the proposal should be accepted, rejected, or modified accordingly.

a. *General.* The procedure involves a three level environmental clearance process: Normal Environmental Clearance; Special Environmental Clearance; and Environmental Impact Statement Clearance.

Normal Clearance is essentially a consistency check with HUD environmental policies and standards and a brief evaluation of environmental impact. Special Clearance requires an environmental evaluation of greater detail and depth. Finally, an Environmental Impact Statement is the complete and fully comprehensive environmental evaluation, including formal review by other Federal, State and local agencies, as prescribed by section 102(2)(C) of NEPA.

Many HUD actions will be subject to a Normal Environmental Clearance. On the basis of that clearance, the proposed project shall be accepted, rejected, or modi-

fied accordingly. However, if, even after appropriate modification to mitigate environmental impacts, it is determined that there is potential significant environmental impact, Special Clearance procedures shall be initiated. If, after Special Clearance and the implementation of any changes mitigating environmental impacts, such impacts are still significant as a result of the action, an Environmental Impact Statement shall be prepared on the proposed action.

Not all proposed actions will undergo Normal Environmental Clearance. Some, because of their size or for other reasons, shall be processed directly through Special Clearance or Environmental Impact Statement Clearance. Projects which shall go directly through Special Clearance or Environmental Impact Statement Clearance are described in Appendices A and B-1.

All required environmental clearances shall be completed prior to the decision points described in Appendix A. The environmental clearance process is discussed further in Appendix B.

(1) *Exemptions.* Although HUD's general policy on environmental considerations applies to all HUD actions, the procedural requirements for environmental clearances set forth in this paragraph shall not apply to those HUD actions which have been determined not be "major Federal actions significantly affecting the quality of the human environment". These shall include an individual action on a one-to-four family dwelling, training grants, or rehabilitation and modernization projects which do not extend the life of a structure twenty (20) years or more. Exemptions from environmental clearances do not exempt these activities from the requirements of Section 106 of the National Historic Preservation Act of 1966 when a property is listed on, or nominated to, the Na-

tional Register of Historic Places. (See Appendix L for Advisory Council on Historic Preservation procedures.)

Planning assistance projects (701 Comprehensive Planning Assistance grants and other planning loans and grants) are exempted from the procedural requirements, but in lieu thereof an environmental assessment of the final planning product shall be required as part of the proposed planning program.

With respect to disaster relief and emergency activities of the Department, procedures for environmental clearance shall not apply to actions designed to meet the temporary housing needs of the affected population. Disaster activities which provide permanent housing and other recovery efforts will follow the environmental clearance procedures. However, where required by the serious nature of the situation and upon the approval of the Assistant Secretary for CPD, activities such as disaster related early land acquisition, clearance of damaged structures and relocation efforts may take place prior to the completion of the environmental review.

Except for these exemptions, all HUD actions must undergo one or more environmental clearances. (Emp. added)

(2) *Additional requirements.* The responsibilities and clearance requirements set forth in this paragraph represent minimum Departmental requirements. Regional Administrators and Area and Insuring Office Directors with the concurrence of the Regional Administrator have discretion to require such additional clearances and responsibilities as are deemed necessary for the effective implementation of this Handbook.

(3) *Controversy.* Decisions resulting from Normal or Special clearance shall give adequate consideration to existing or potential environmental controversy. Issues raised by opponents and supporters of the HUD actions

shall be carefully examined to determine whether the project involves significant environmental impacts. Major controversy which appears to raise substantive environmental issues is a factor which should contribute to a decision to undertake a more comprehensive environmental clearance procedure than would otherwise be initiated. For example, in the case of projects which would ordinarily require only Normal Clearance, major environmental controversy should weigh heavily in the decision to undertake a Special Clearance. Likewise for projects which normally require only Special Clearance, major controversy on environmental issues should weigh heavily in the decision to undertake Environmental Impact Statement Clearance.

(4) *Retroactivity.* To the maximum extent practicable, environmental clearance shall be required for uncompleted projects which have never gone through an environmental clearance under NEPA, at such time as a subsequent significant HUD action, such as the next stage of program approval or approval of a major amendatory, is proposed. Where it is not practicable to reassess the basic course of action, major attention should be given to measures, which, given the stage of project completion, may reduce adverse environmental impact. It is also important in taking further action that account be taken of environmental consequences not fully evaluated at the outset of the project.

(5) *Evaluation of comprehensive activities.* Individual actions that are related either geographically or as logical parts in a composite of contemplated actions may be more appropriately evaluated in a single environmental clearance. For example, several subdivisions may form a large new development. Likewise, a comprehensive project may be composed of, or include, several interrelated

activities, e.g., development of a new community or redevelopment of a center city area. In these cases, and where feasible, HUD offices should aggregate individual activities into a larger package and environmental evaluation shall concentrate on the broad and cumulative impacts of the larger activity, as well as the project specific impact of component activities to the extent known.

The comprehensive environmental evaluation will not satisfy the requirements of this Handbook, howeveer, if it is superficial or limited to generalities. When all significant issues cannot be anticipated or adequately treated in connection with the comprehensive assessment as a whole, environmental clearances of more limited scope will be necessary on subsequent, individual actions in order to fulfill the requirements of this Handbook.

Impacts of individual activities may be singularly limited but cumulatively considerable. One purpose of this provision, therefore, is to stimulate a more comprehensive environmental evaluation. In addition, there may be environmental impacts which are common to all or most components of the larger activity. A secondary purpose, therefore, is to eliminate duplicative evaluative efforts where possible. In no case shall this provision be interpreted to avoid a detailed examination of environmental impacts.

* * *

APPENDIX C

HUD Proposed Rules, 24 C.F.R. Part 50

Subpart B—Environmental Clearances on HUD Actions

§ 50.10 Purpose.

The purpose of this subpart is to establish a procedure for determining whether a proposed HUD action is a "major Federal action significantly affecting the quality of the human environment", and whether the proposal should be accepted, rejected, or modified accordingly.

§ 50.11 Environmental clearance process.

The procedure involves a three level environmental clearance process: Normal Environmental Clearance; Special Environmental Clearance; and Environmental Impact Statement Clearance. Normal Clearance is essentially a consistency check with HUD environmental policies and standards and a brief evaluation of environmental impact. Special Clearance requires an environmental evaluation of greater detail and depth. Finally, an Environmental Impact Statement is the complete and fully comprehensive environmental evaluation, including formal review by other Federal, State and local agencies, as prescribed by section 102(2)(C) of NEPA. Many HUD actions will be subject to a Normal Environmental Clearance. On the basis of that clearance, the proposed project shall be accepted, rejected, or modified accordingly. However, if, even after appropriate modification to mitigate environmental impacts, it is determined that there is potential significant environmental impact, Special Clearance procedures shall be initiated. If, after Special Clearance and the implementation of any changes mitigating environmental impacts, such impacts are still significant as a result of the action, an Environmental Impact Statement shall be prepared on the proposed action. The mere

mitigation of adverse effects does not indicate that a project has no significant impact; an Environmental Impact Statement may be required even though adverse effects have been mitigated. All required environmental clearances shall be completed prior to the decision points described in Appendix A.

(a) *Exemptions.* Although HUD's general policy on environmental considerations applies to all HUD actions, the procedural requirements for environmental clearances set forth in this subpart shall not apply to those HUD actions which have been determined not to be "major Federal actions significantly affecting the quality of the human environment". These shall include an individual action on a one-to-four family dwelling, training grants, or rehabilitation and modernization projects which do not extend the life of a structure twenty (20) years or more. Exemptions from environmental clearances do not exempt these activities from the requirements of section 106 of the National Historic Preservation Act of 1966 when a property is listed on, or nominated to the National Register of Historic Places.

(1) Planning assistance projects (701 Comprehensive Planning Assistance grants and other planning loans and grants) are exempted from the procedural requirements, but in lieu thereof an environmental assessment of the Final planning product shall be required as part of the proposed planning program.

(2) With respect to disaster relief and emergency activities of the Department, procedures for environmental clearance shall not apply to actions designed to meet the temporary housing needs of the affected population. Disaster activities which provide permanent housing and other recovery efforts will follow the environmental clearance procedures. However, where required by the serious nature of the situation and upon the approval of the

Assistant Secretary for CPD, activities such as disaster related early land acquisition, clearance of damaged structures, and relocation efforts may take place prior to the completion of the environmental review.

(3) *Except for these exemptions, all HUD actions must undergo one or more environmental clearances prior to the decision-points listed in Appendix A-1 to this part.* (Emp. added)

(b) *Limitation on actions pending clearance.* Pending preparation and completion of any environmental clearance, the appropriate HUD official may, after consultation with the Assistant Secretary for CPD or his designee, direct an applicant to refrain from taking any action with respect to a project which such official determines might have an adverse environmental effect or might so alter the environmental premises on which the clearance is based as to affect the validity of the conclusions reached. Such official may also direct the applicant to take such additional actions as he determines are necessary to preserve the status quo. The applicant shall promptly comply with all directions issued in accordance with this subsection.

(c) *Additional requirements.* The responsibilities and clearance requirements set forth in this subpart represent minimum Departmental requirements. Regional Administrators and Area and Insuring Office Directors with the concurrence of the Regional Administrator have discretion to require such additional clearances and responsibilities as are deemed necessary for the effective implementation of this part.

(d) *Controversy.* Decisions resulting from Normal or Special Clearance shall give adequate consideration to existing or potential environmental controversy. Issues raised by opponents and supporters of the HUD actions shall be carefully examined to determine whether the project involves significant environmental impacts. Major

controversy which appears to raise substantive environmental issues is a factor which should contribute to a decision to undertake a more comprehensive environmental clearance procedure than would otherwise be initiated. For example, in the case of projects which would ordinarily require only Normal Clearance, major environmental controversy should weigh heavily in the decision to undertake a Special Clearance. Likewise for projects which normally require only Special Clearance, major controversy on environmental issues should weigh heavily in the decision to undertake Environmental Impact Statement Clearance.

(e) *Retroactivity.* To the maximum extent practicable, environmental clearance shall be required for uncompleted projects which have never gone through an environmental clearance under NEPA, at such time as a subsequent significant HUD action, such as the next stage of program approval or approval of a major amendatory, is proposed. Where it is not practicable to reassess the basic course of action, major attention should be given to measures which, given the stage of project completion, may reduce adverse environmental impact. It is also important in taking further action that account be taken of environmental consequences not fully evaluated at the outset of the project.

(f) *Evaluation of comprehensive activities.* Individual actions that are related either geographically or as logical parts in a composite of contemplated actions may be more appropriately evaluated in a single environmental clearance. The comprehensive environmental evaluation will not satisfy the requirements of this part, however, if it is superficial or limited to generalities. When all significant issues cannot be anticipated or adequately treated in connection with the comprehensive assessment as a whole, environmental clearances of more limited

scope will be necessary on subsequent individual actions in order to fulfill the requirements of this part.

* * *

(h) *Environmental clearance forms.* Environmental clearance forms shall be used in conducting the required environmental clearance(s) for project level actions as directed in this part. Form ECO-1, completed by the applicant, shall be used by HUD principally as a source of factual information. An independent environmental assessment and evaluation shall be conducted by HUD on Form ECO-2 or Form ECO-3, or an Environmental Impact Statement shall be prepared. The completed clearances shall become part of the application file and shall accompany the proposal through the review and decision-making process.

(1) The Applicant's Environmental Information, Form ECO-1, shall be required of applicants for all project proposals except those exempted in § 50.11(a)(1). The applicant shall be provided with Form ECO-1 along with the required program application forms, and the environmental clearance requirements shall be explained in the earliest stages of contact and application preparation. The appropriate HUD official shall indicate to the applicant the initial level of environmental clearance required for the proposed project. The completed Form ECO-1 shall accompany A-95 notification where required. It shall be submitted to HUD with the completed application.

(2) After obtaining information from other sources, HUD shall evaluate and verify the information provided by the applicant on Form ECO-1. HUD may begin preparing the appropriate clearance worksheet at this time or may await the resolution of problems. The applicant shall be asked to modify or supplement Form ECO-1 as appropriate: If there is inadequate information,

the applicant shall be asked to supplement Form ECO-1 with documentation as necessary; if there are environmental problems, the applicant shall be asked to present solutions, modify the project, include measures to enhance environmental quality or reduce adverse environmental impacts, provide assurances and documentation as necessary, and amend or revise Form ECO-1 accordingly. HUD shall then complete the appropriate environmental clearance worksheet, or shall prepare the Draft Environmental Impact Statement.

(i) *Relationship Between A-95 procedures and environmental clearance procedures.* OMB Circular A-95 provides a mechanism for securing comments and views of State and local agencies regarding the impact, including environmental impact, of Federal and Federally-assisted projects. The A-95 requirements are coordinated, but not synonymous, with the requirements set forth in this part. Those programs or projects which are not subject to A-95 requirements are nevertheless subject to environmental clearance requirements unless specifically exempted in § 50.11(a)(1). The requirements of this part and OMB Circular A-95 shall be coordinated in the following manner:

(1) *Project Notification and Review System (PNRS).* The A-95 Project Notification and Review System requires that, for non-housing programs covered by Attachment D of the A-95 Circular, the applicant submit to the appropriate clearinghouses a notice of intent to file an application for Federal assistance. For housing projects exceeding A-95 thresholds listed in paragraph 7c of Attachment A and under programs listed Attachment D, HUD is required to send the application submitted by the applicant to the appropriate clearinghouses. Housing projects under A-95 thresholds are not subject to the A-95 requirements. Environmental clearances procedures

set forth in this part require that the applicant prepare Form ECO-1. For programs also covered by the A-95 Circular, such form shall accompany the A-95 submission.

(2) *Inclusion of A-95 Comments in Draft EIS.* A-95 review of a proposed project generally takes place prior to the preparation of an impact statement. Therefore, comments on the proposed project that are secured during this stage of the A-95 process must be included in the Draft EIS. The comments received from clearinghouses, or by State and local environmental agencies through clearinghouses, in the A-95 review shall be attached to the draft impact statement when it is circulated for review.

(3) *Review of environmental impact statement.* If an Environmental Impact Statement is required, HUD shall notify the appropriate A-95 clearinghouses of HUD's intent to prepare and file the Draft Statement. When the Draft Statement is distributed, HUD shall send copies of the Statement to the appropriate clearinghouses for review and comment, regardless of whether or not the subject proposal is covered by OMB Circular A-95. The clearinghouses shall also receive copies of the Final Statement for their information.

(j) *Updating environmental clearances.* Environmental clearances shall be updated by revision, amendment or addendum to the original clearance, if:

(1) Additional information with significant implications for environmental impact or additional environmental impacts not previously considered is discovered during the review process. Actions which went through Normal or Special Environmental Clearance shall be updated by revision, amendment or addendum to the original environmental clearance worksheet. A new finding shall then be made on the basis of all information,

and action taken accordingly. For actions for which a Draft and Final Environmental Impact Statement was prepared and distributed, the Final Statement shall be revised and reissued, or an addendum to the Statement shall be prepared and distributed. Such revision or addendum shall be subject to the same review and comment procedures as was the original Final Statement.

(2) Major amendatories are proposed. For major amendatories, the type and extent of environmental clearance required shall depend on the type, size and scale of the proposed action as amended. If an EIS is prepared for the amendatory, it shall be prepared and processed pursuant to § 50.14.

(3) HUD approval action is required for component activities whose environmental impacts were not addressed in sufficient detail in original environmental clearance for the larger action. Such clearance shall focus on the environmental impact of the specific project and site and need not treat the environmental impact on the more comprehensive level addressed in the original Environmental Impact Statement. A finding shall then be made as to the significance of the environmental impact of the specific project activity, and action taken accordingly. If an Environmental Impact Statement is prepared for the component activity, it shall be prepared and processed pursuant to § 50.14.

§ 50.12 Normal environmental clearance.

Normal Environmental Clearance shall be required for HUD actions for which it is not immediately evident that Special Environmental Clearance or Environmental Impact Statement Clearance is required. Normal Environmental Clearance is a consistency check with HUD environmental policies and standards and a brief evaluation of environmental impact. Information shall be requested

from the applicant on Form ECO-1 and gathered from other sources as appropriate. After modifications to the proposal to mitigate environmental impacts as necessary, HUD shall conduct an independent assessment and evaluation on Form ECO-2.

(a) *Responsibility for clearance.* Responsibility for Normal Environmental Clearance shall rest with the Area/Insuring Office program staff. An information copy shall be sent to the ECO.

(b) *Action resulting from clearance.*

(1) If after appropriate modifications to the proposal there exist environmental impacts which are unavoidable, and, based on HUD environmental policies and standards, such impacts are also considered unacceptable, then the proposal shall be rejected.

(2) If there is no significant environmental impact, processing of the proposal may proceed. Conditions or safeguards found to be necessary in order to protect and enhance environmental quality or minimize adverse environmental impacts shall be set forth in the contract, grant, or comparable document.

(3) If after appropriate modifications to the proposal to mitigate environmental impacts, there remains significant or potentially significant environmental impact, Special Environmental Clearance or EIS, as appropriate, is required. The mere mitigation of adverse effects does not indicate that a project has no significant impact; an EIS may be required even though adverse effects have been mitigated.

§ 50.13 Special environmental clearance.

Project level actions found to require Special Environmental Clearance by virtue of their size or scale (in relation to the thresholds in Appendix A-1 to this part) or other characteristics indicating significant en-

vironmental impact, or as a result of Normal Environmental Clearance, shall be subject to the requirements in paragraph (a) of this section. Proposed legislation, regulations, policy issuances, guidance documents, and revisions to such regulations and documents, which may have significant environmental impact, shall be required to undergo the Special Environmental Clearance for policy actions as set forth in paragraph (b) of this section.

(a) Project level actions. Special Environmental Clearance for project level actions is a preliminary version of the analysis required in the Environmental Impact Statement. It provides the HUD official with a factual basis for determining whether the proposed action has a significant environmental impact and hence, whether it should be approved, rejected, or modified, or whether an Environmental Impact Statement is required. Information required shall be requested from the applicant on Form ECO-1 and gathered from other sources as appropriate. After modifications to the proposal to mitigate environmental impacts as necessary, HUD shall conduct an independent assessment and evaluation. On the basis of this assessment an environmental finding shall be made and accompany the application through the review process.

* * *

(2) *Action resulting from clearance.*

(i) If after appropriate modifications to the proposal, there exist environmental impacts which are unavoidable, and, based on HUD environmental policies and standards, such impacts are also considered unacceptable, then the proposal shall be rejected.

* * *

(iii) If after appropriate modifications to the proposal to mitigate environmental impacts, there remains

significant or potentially significant environmental impact, an Environmental Impact Statement shall be prepared. The mere mitigation of adverse effects does not indicate that a project has no significant impact; an EIS may be required even though adverse effects have been mitigated.

* * *

§ 50.14 Environmental impact statement clearance.

Environmental Impact Statement Clearance shall be required for all major HUD actions significantly affecting the quality of the human environment.

(a) *Environmental impact statement.* The Environmental Impact Statement is comprised of two stages, Draft and Final.

(1) *Notice of intent to file an environmental impact statement.* As soon as practicable after a determination is made that a HUD action will require the preparation and circulation of an environmental impact statement, a Notice of Intent to File shall be prepared to inform the public and to solicit comments that may be helpful in preparing the statement. Copies of this notice shall be sent to local newspapers, groups known to be interested in the agency's activities, the chief executive of the general unit of local government, local and State agencies, A-95 clearinghouses, the Assistant Secretary for CPD, the RO and CO-ECOs, and the RO Public Information Officer. When the appropriate HUD official determines that an environmental impact statement is not necessary, a Notice of Intent Not To File an EIS shall be prepared to inform the public under the following circumstances:

(i) HUD has previously announced the action would be the subject of an environmental impact statement; or

(ii) HUD has made a Finding of Inapplicability in response to a request from CEQ for the preparation and

circulation of an EIS.

The notice shall include a statement of the reasons for this decision. This determination and the reasons for the decision shall be prepared and disseminated in the same manner as a Notice of Intent to File an EIS.

* * *

(d) *Action resulting from clearance.* Based on the Environmental Impact Statement clearance, including comments and suggestions by other agencies and interested parties, HUD shall attempt to mitigate adverse environmental impacts to the extent practicable. If there remain adverse environmental impacts which are unavoidable, and based on HUD environmental policies and standards, such impacts are also considered unacceptable, the proposal shall be rejected. Otherwise, unavoidable adverse environmental impacts shall be weighed against benefits to be obtained from approval of the proposal. Where environmental costs which would be incurred outweigh such benefits, the proposal shall be rejected. Where benefits of the proposal outweigh environmental costs, processing may proceed; conditions or safeguards found to be necessary in order to protect and enhance environmental quality or minimize adverse environmental impacts shall be set forth in the contract, grant, or comparable document.

APPENDIX D

Title 24—Housing and Urban Development

Subpart B—Delegations of Basic Authority and Functions

§ 1700.80 Director of the Examination Division, Office of Interstate Land Sales Registration, and Deputy.

To the position of Director of the Examination Division, Office of Interstate Land Sales Registration, and under his supervision to the position of Deputy Director there are delegated and assigned the following authorities and responsibilities.

(a) To receive and examine all statements of record and property reports filed under the provisions of the Interstate Land Sales Full Disclosure Act and all amendments and corrections to such statements.

(b) To determine the adequacy of disclosure of statements of record and property reports and amendments thereto and to effect corrections, additions, and deletions in such statements and reports deemed necessary to achieve the purposes of the Interstate Land Sales Full Disclosure Act.

(c) To find effective or to recommend to the Administrator that he declare not effective statements of record filed under the Interstate Land Sales Full Disclosure Act and to prepare and present evidence in connection with hearings and other administrative proceedings relative to statements of record declared not effective.

* * *

§ 1710.45 Suspensions.

(a) *Suspension notice—prior to effective date.*—(1) A suspension notice with respect to a Statement of Record or an amendment may be issued to a developer by the

Secretary within 30 days after the date of filing if prior to its effective date, the Secretary has reasonable grounds to believe that a Statement of Record is on its face incomplete or inaccurate in any material respect; or prior to its effective date, the Secretary has reasonable grounds to believe that an amendment is on its face incomplete or inaccurate in any material respect.

(2) Suspension notices issued pursuant to this subsection shall suspend the effective date of the statement or the amendment until 30 days, or such earlier date as the Secretary may determine, after the developer files such additional information as the Secretary shall require

(3) A developer, upon receipt of a suspension notice may request a hearing within 15 days of receipt of such notice. Such hearing shall be held within 20 days of receipt of such request by the Secretary.

(4) Suspension notices issued pursuant to this section shall continue in effect until all deficiencies cited in the notice are corrected.

(b) *Suspension orders—subsequent to effective date.*—(1) A notice of proceedings to suspend an effective Statement of Record may be issued to a developer if the Secretary has reasonable grounds to believe that an effective Statement of Record includes an untrue statement of a material fact, or omits a material fact required by the Act or the rules and regulations, or omits a material fact which is necessary to make the statements therein not misleading. The Secretary may, after notice, and after opportunity for a hearing requested within 15 days of receipt of such notice, issue an order suspending the Statement of Record. In the event that a suspension order is issued, such order shall remain in effect until the developer has amended the Statement of Record or otherwise complied with the requirements of the order.

When the developer has complied with the requirements of the order, the Secretary shall so declare and thereupon the suspension order shall cease to be effective.

(2) If the Secretary undertakes an examination of a developer or his records to determine whether a suspension order should be issued, and the developer fails to cooperate with the Secretary or obstructs, or refuses to permit the Secretary to make such examination, the Secretary may issue an order suspending the Statement of Record. Such order shall remain in effect until the developer has complied with the requirements of the order. When the developer has complied with the requirements of the order, the Secretary shall so declare and thereupon the suspension order shall cease to be effective.

(3) Upon receipt of an amendment to an effective Statement of Record, the Secretary may issue an order suspending the Statement of Record until the amendment becomes effective if he has reasonable grounds to believe that such action is necessary or appropriate in the public interest or for the protection of purchasers.

(4) Suspension orders issued pursuant to this subsection shall operate to suspend the Statement of Record as of the date the order is either served on the developer or his registered agent or is delivered by certified or registered mail . . .

* * *

As to the "not misleading" requirement, see Instruction A(2) of the Instructions for Completion of the Statement of Record, 24 C.F.R. Sec. 1710.105, which requires that

> "in addition to the information expressly required to be stated in the statement of record, there shall be added such further material information, documentation and certification, *if any, as may be neces-*

sary in the public interest and for the protection of purchasers or necessary in order to make the statements in the light of the circumstances under which they are made, not misleading.

APPENDIX E

5th Annual Report of C.E.Q. (pp. 21-26, 489-90)

* * *

Leisure Homes and Recreational Development

As incomes and leisure time have increased over recent years, there has been a growing demand for recreational facilities in rural areas. Out of this demand have come the phenomena of leisure home and recreational lot developments—high density developments in rural settings. These phenomena create the same types of costs as the forms of urbanization described above. With recreational developments, in fact, the long-term costs of development to both property owners and the public may be greater than in most urban areas, and there may be more urgent need for effective controls.

Leisure home developments, of course, are not a new phenomenon. The Florida east coast, Cape Cod, Estes Park, and Lake Tahoe have been the sites of second home construction for many decades. Originally, these homes were owned almost exclusively by wealthier Americans, and houses were often expensive and built on large sites.

The more recent boom in second homes and recreational lots has involved a far broader stratum of society. Increased affluence has given more Americans the opportunity and desire to obtain such properties for themselves. This, combined with a widespread belief in the profitability of investment in land and reinforced by favorable income tax laws, has provided the ingredients for the recreational land and leisure home boom. The lots are smaller, the houses are more spare than traditional summer homes, and demand is many times greater than it was even a few years ago. Today approximately

3.4 million American families own second homes. Including owners of recreational lots, a total of 5 to 7 million American families are estimated to own recreational properties of some kind.

Table 4 presents a number of characteristics of households owning leisure homes. It shows clearly that these homes are no longer the province of the very wealthy. They are owned by families somewhat wealthier and somewhat older than the average but still comprising essentially a cross section of society. (Corresponding information about owners of recreational lots is not available, although there is evidence that they tend to be less affluent.)

The material on leisure homes and other recreational properties was obtained from a study on leisure homes undertaken by the American Society of Planning Officials for the Council on Environmental Quality in association *with the Department of Housing and Urban Development* and the Appalachian Regional Commission. The study indicates the importance of distinguishing between two separate aspects of the phenomenon: (1) the purchase of recreational lots, which are usually part of large subdivisions of plotted land where few of the lots may ever be developed; and (2) the ownership of leisure homes, which may be built by the owner in a subdivision or on a separate site, or built in large numbers by a developer.

Recreation lot sales often result from mail solicitation or telephone calls, and many buyers sign sales contracts without ever seeing the land. The Interstate Land Sales Act requires most lot sales in interstate commerce to be registered with the Office of Interstate Land Sales at the Department of Housing and Urban Development. Table 5, showing the regional breakdown of projects so registered, and Table 6, showing leisure homes by region,

Table 4

Selected Characteristics of U.S. Leisure Home Owners and Total U.S. Population

Characteristic	Percent of all house-holds	Percent of leisure home owners	Leisure home owners as a percent of total house-holds
Annual family income			
Less than $5,000	29.4	18.8	2.9
$5,000 to $9,999	30.9	24.5	3.6
$10,000 to $14,999	22.6	23.7	4.7
$15,000 to $24,999	13.2	20.9	7.2
$25,000 or more	3.9	12.1	14.1
Value of primary home			
Less than $15,000	41.3	31.3	3.4
$15,000 to $19,999	20.2	17.8	4.0
$20,000 to $24,999	14.7	13.5	4.1
$25,000 to $34,999	14.1	18.1	5.8
$35,000 to $49,999	6.5	10.7	7.4
$50,000 or more	3.2	8.6	12.2
Tenure of primary home			
Owned	59.3	73.1	5.6
Rented	35.4	22.7	2.9
Co-op or condominium	0.5	1.1	11.0
Other	4.8	3.1	2.9
Primary residence			
Inside SMSAs	69.1	68.0	4.4
Central city	34.1	31.0	4.1
Urban balance	24.7	26.2	4.8
Remainder	10.4	10.8	4.7
Outside SMSAs	30.9	32.0	4.7
Urban	75.1	75.2	4.5
Rural	24.9	24.8	4.5
Rural–nonfarm	20.0	20.3	4.6
Rural–farm	4.9	4.5	4.1
Places 10,000 to 50,000	20.4	21.9	4.8
Age of head of household			
Less than 25 years	7.1	4.0	2.5
25 to 34 years	21.0	10.0	2.1
35 to 44 years	21.2	18.5	3.9
45 to 54 years	20.1	25.9	5.8
55 to 64 years	17.5	22.7	5.9
65 years or older	13.1	18.9	6.5
Family size			
1 person	17.6	13.3	3.4
2 persons	29.6	35.0	5.3
3 persons	17.2	18.1	4.7
4 or 5 persons	25.2	24.8	4.4
6 or more persons	10.4	8.8	3.8

Source: Richard L. Ragatz Associates, *Recreational Properties: An Analysis of the Markets for Privately Owned Recreational Lots and Leisure Homes* (Springfield, Va.: National Technical Information Service, 1974).

Table 5

Recreational Properties Registered with the Office of Interstate Land Sales

	Acres in projects		Lots in projects	
	Total	Per 100 acres of region's area	Total	Per 100 families in region
United States	**7,146,229**	**0.5**	**3,375,821**	**5.3**
Northeast	**231,555**	**0.2**	**133,671**	**0.9**
New England	77,251	0.2	36,766	1.0
Middle Atlantic	154,304	0.2	96,905	0.8
North Central	**279,214**	**0.1**	**224,886**	**1.3**
East North Central	168,634	0.1	132,389	1.1
West North Central	110,580	0.04	92,497	1.8
South	**3,370,140**	**1.0**	**2,037,908**	**10.6**
South Atlantic	2,243,119	1.4	1,113,146	11.8
East South Central	127,291	0.1	123,022	3.2
West South Central	999,730	0.4	801,740	13.5
West	**3,265,320**	**0.8**	**979,356**	**8.8**
Mountain	2,489,408	0.9	750,270	29.8
Pacific	775,912	0.6	229,086	2.6

Source: Richard L. Ragatz Associates, *supra* Table 4, pp. 84, 87, 500.

Table 6

U.S. Leisure Homes by Region, 1970

Region	Total housing units	Leisure homes [1]	Percent of all housing units in region	Percent of all leisure homes in United States
United States	**68,418,094**	**2,143,434**	**3.1**	**100.0**
Northeast	**16,641,954**	**556,790**	**3.4**	**26.0**
New England	4,031,531	221,806	5.5	10.4
Middle Atlantic	12,610,423	334,984	2.7	15.6
North Central	**19,018,773**	**667,148**	**3.5**	**31.1**
East North Central	13,323,755	421,225	3.2	19.7
West North Central	5,695,018	245,923	4.3	11.5
South	**20,730,508**	**631,242**	**3.0**	**29.5**
South Atlantic	9,970,059	287,374	2.9	13.4
East South Central	4,184,006	127,039	3.0	5.9
West South Central	6,576,443	216,829	3.3	10.1
West	**12,026,859**	**288,254**	**2.4**	**13.5**
Mountain	2,762,783	115,901	4.2	5.4
Pacific	9,264,076	172,353	1.9	8.0

[1] "Leisure Homes" are enumerated by combining the Bureau of the Census categories "Rural Seasonal Vacant" and "Other Rural Vacant." This combination basically includes housing units which are intended for occupancy during only certain seasons of the year.

Source: Richard L. Ragatz Associates, *supra* Table 4, p. 91.

indicate a heavy concentration of lots in the South and in the West. Six states—Florida, Texas, California, New Mexico, Arizona, and Colorado—contain over 80 percent of the acreage in registered recreational lot sales projects.

These figures demonstrate that recreational land and leisure home developments have become very important in the United States. With them have come a host of problems. Some problems are consumer-related, such as fraudulent advertising and high pressure sales tactics used to take advantage of naive buyers. Attempts are being made to curb these unethical practices through implementation of the Interstate Land Sales Act at the Federal level and through similar laws in some states.

Other problems arise because such development brings what amounts to instant urbanization to rural communities—communities where local governments have little experience with the impacts of large-scale development and few land use controls or regulatory bodies to deal with them.

Many leisure homes are being built in subdivisions that differ little in appearance from typical middle income suburban developments. Yet they are often built to much lower standards. If the home remains a summer weekend retreat, this may not create serious problems. But experience shows that seasonal homes are often converted into year-round homes and leisure home developments into permanent communities. This process may take a few years or decades, depending on the proximity of the homes to urban employment areas. In the mountains of northern Virginia, some homes in recreational subdivisions are being occupied as first homes from the time they are built, with their occupants commuting two hours or more to jobs on the fringes of Washington and Baltimore. School buses can be seen serving these developments

soon after the first houses go up. In short, the leisure home subdivision of today is likely to become the permanent settlement or suburb of tomorrow and should be viewed as an early form of urbanization.

This being true, it is necessary for a community to consider very carefully what development standards are appropriate for these subdivisions, particularly in communities with little growth experience, where officials are not equipped to cope with rapid growth and change. Many rural communities initially welcome second home developments in the expectation that they will provide property tax revenue and income for the local economy. They usually do, but they also create costs. Local governments often end up bearing the cost of increased demands the developments place on such public services as fire and police protection, road maintenance, water supply, solid waste disposal, and sewers. As long as recreational subdivisions remain seasonally occupied, these costs are likely to be lower than the property tax revenues generated by the development. However, as soon as residences become permanent, costs to the host communities will rise rapidly as schools, medical facilities, and other public services are required.

The eventual public costs will be particularly high if the development was originally built to low standards. Septic fields may have to be replaced by a sewer system; poorly constructed roads may have to be rebuilt. Replacing such facilities is very expensive, often more expensive than building adequate facilities at the time of the initial development.

Now only will the costs of low quality development be higher to the government, but they will also be higher to the homeowners. Inadequate insulation, poor drainage, and insufficient heating capacity may be small

problems during summer weekends, but they become major concerns at other times of the year.

The developments may also create serious environmental problems, although many of these can be avoided by careful design and review. Inadequate septic systems can pollute streams or aquifers and thus cause public health problems. Serious erosion can clog streams with silt. Demand for water can overtax local supplies. These environmental problems can cause particular difficulty because the most desirable sites for recreational developments are often in fragile environments unsuitable for housing development, such as steep mountain slopes, coastal dunes, or marshes.

In addition to such environmental problems, the developments also present potential conflicts with public recreational goals. The crowding of seasonal homes along the coast or around the shore of a lake often denies access to those resources for public recreation. And developing land adjacent to national parks and forests guarantees the owners that they will always have ready access to natural areas, but it prohibits the later expansion of public land holdings for the benefit of the general public.

Many of these problems are very similar to those faced in urban areas. The CEQ's study of second homes, mentioned above, will attempt to help rural communities in dealing with proposed developments. One specific product of the study is an impact evaluation handbook for local officials to use in assessing the costs and benefits of proposed recreation developments.

* * *

Leisure Homes Study

The Council, in association with the Department of Housing and Urban Development and the Appalachian

Regional Commission has sponsored an 18-month study of leisure home and similar recreational land projects. The study was conducted by the American Society for Planning Officials with the Conservation Foundation, the Urban Land Institute, and Professor Richard Ragatz of the University of Oregon as subcontractors. Some of the results of this study are discussed in Chapter 1 of this Annual Report.

The first part of the study involved an extensive analysis of the market for recreational properties. Using several new sources of data, this analysis summarizes what is known about the number and location of lots developed, homes built, projects started, facilities provided, and about the developers and owners of these properties. This analysis also includes regional projections of recreational developments.

The second part of the study involves an analysis of the economic environmental, social, and political impacts of leisure homes and certain other types of recreational developments on the localities and regions in which they occur. This analysis is based on an extensive review of previous research on leisure home development as well as a number of case studies undertaken by the research team. As mentioned in Chapter 1, the study concludes that leisure homes are over time converted into permanent residences and therefore should be viewed as a special form of early urbanization which generates the same types of economic, environmental, and social impacts as other residential developments. Further, leisure home developments may create more serious environmental problems than most residential developments because they often take place where there are few effective land use controls and are often built to lower standards and in less suitable environments—for example, on

mountainsides or in wetlands—than normal surburban subdivisions.

In terms of their economic impact on the local government, the study finds that as long as they are used only for recreational purposes, leisure homes usually generate tax revenues in excess of the costs of the public services required. However, as the developments become converted to permanent homes, these costs may exceed the tax payments, particularly if conversion results in a need for public investment to upgrade or replace roads, water supplies, and sewers.

Private recreational developments may also create social problems resulting from the impact of outsiders on the local culture and the way such developments interfere with the public's use of valuable recreational environments.

Finally, the study analyzes and recommends local, state, and Federal legislative mechanisms for mitigating the various adverse impacts that the developments may generate.

The results of the study will be published by CEQ and HUD. One volume will summarize the findings of the study, and a second volume will be a handbook for use by local officials in reviewing and evaluating the probable impacts of proposed projects.

APPENDIX F

15 U.S.C. § 1705

(12) such other information and such other documents and certifications as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers.

§ 1706. Effective date of statements of record and amendments thereto—Thirtieth day after filing or such earlier date as determined by Secretary; consolidation of subsequent statement with earlier recording

(a) Except as hereinafter provided, the effective date of a statement of record, or any amendment thereto, shall be the thirtieth day after the filing thereof or such earlier date as the Secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the consent of the Secretary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidated statement of record any material changes in the information contained in the earlier statement.

Incomplete or inaccurate statements of record

(b) If it appears to the Secretary that a statement of record, or any amendment thereto, is on its face incom-

plete or inaccurate in any material respect, the Secretary shall so advise the developer within a reasonable time after the filing of the statement or the amendment, but prior to the date the statement or amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statement or the amendment until thirty days after the developer files such additional information as the Secretary shall require. Any developer, upon receipt of such notice, may request a hearing, and such hearing shall be held within twenty days of receipt of such request by the Secretary.

Amendment of statement of record

(c) If, at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement, the developer shall promptly file an amendment thereto. Upon receipt of any such amendment, the Secretary may, if he determines such action to be necessary or appropriate in the public interest or for the protection of purchasers, suspend the statement of record until the amendment becomes effective.

Suspension of statement of record containing untrue statement or omission to state material fact; notice and hearing; termination of order of suspension

(d) If it appears to the Secretary at any time that a statement of record, which is in effect, includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in

accordance with such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

* * *

§ 1707. Information required in property report; use for promotional purposes

(a) A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record, and any amendments thereto, as the Secretary may deem necessary, but need not include the documents referred to in paragraphs (7) to (11), inclusive, of section 1705 of this title. A property report shall also contain such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers.

* * *

Supreme Court, U. S.
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No. 75-545

In the Supreme Court of the United States

OCTOBER TERM, 1975

CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 520 F. 2d 240. The findings of fact and conclusions of law of the district court are reported at 382 F. Supp. 69 (Pet. App. C).

JURISDICTION

The judgment of the court of appeals (Pet App. B) was entered on July 30, 1975. The petition for a writ of certiorari was filed on October 8, 1975, and was

granted on December 8, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Environmental Policy Act requires the Department of Housing and Urban Development to prepare an environmental impact statement before a disclosure statement filed with it by a private real estate developer pursuant to the Interstate Land Sales Full Disclosure Act may become effective.

STATUTES INVOLVED

The relevant portions of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 43 U.S.C. 4321 *et seq.*, and the Interstate Land Sales Full Disclosure Act, 82 Stat. 590 as amended, 15 U.S.C. 1701 *et seq.*, are set out in the appendix to this brief, *infra*, pp. 1A–10A.

STATEMENT

Respondents Scenic Rivers Association of Oklahoma and Illinois River Conservation Council are non-profit Oklahoma corporations organized for the purpose of protecting the Illinois River and the undeveloped portion of its environs, which some of their members use for recreation (R. 582–583; Pet. App. C, pp. 19a, 21a, 23a).[1] On April 24, 1974, respondents brought this suit in the United States District Court for the Eastern District of Oklahoma against the Secretary of the Department of Housing and Urban Development (HUD) and the Administrator of HUD's Office of Interstate Land Sales Registration

[1] "R." refers to the record on appeal.

(OILSR),[2] seeking a declaratory judgment and an injunction requiring that the defendants, "prior to approval and registration of a statement of record and property report, under the Interstate Land Sales Act, conduct an environmental study in compliance with the National Environmental Policy Act [NEPA] * * *" (R. 582–583). Alleging in their complaint that more than 3,000 homesites were being platted for sale in the Illinois River area (R. 589), respondents also sought a preliminary injunction to require the federal defendants to "[w]ithdraw approval of the Interstate Land Sales filing by the Flint Ridge Development Company" (R. 597–598).

The district court permitted Flint Ridge Development Company to intervene as a defendant (Pet. App. C, p. 19a) The company, which is an Oklahoma partnership, owns 7,000 acres of land in northeastern Oklahoma adjacent to the Illinois River (R. 860; Pet. App. C, pp. 21a, 23a). In February 1974, the company had filed with OILSR a statement of record and property report in regard to "Flint Ridge No. 1," which consisted of approximately 1,000 residential lots on 2,200 acres of the company's land that were to be offered for sale to the public (R. 860).

The company stated that the subdivision would have 11 miles of paved and 24 miles of unpaved roads; at the time of the filing, half of the road construction had been completed (R. 880). Lot purchasers would be required to obtain a septic tank permit from the County

[2] The district court dismissed other federal and state agencies named in the complaint as "additional defendants" (R. 581, 656, 661).

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Health Department (R. 870)[3] and to arrange with local suppliers for gas, electricity and telephone service (R. 887–888). Various recreational facilities, including artificially-created lakes, were planned and construction on some had begun (R. 892–894, 898); one clubhouse was completed (R. 894); and the developer had built four model homes (R. 905).[4]

By the beginning of August 1974, when the district court held a three-day hearing in the case, sixteen septic tanks (all approved by local health authorities) had been installed in Flint Ridge No. 1; a number of lakes had been cleared of timber and brush; and dams and bridges had been constructed (Tr. 455, 527, 537). In developing the property, the company had spent $3,500,000 during the preceding fourteen months (Tr. 540). The Oklahoma Water Resources Board, after a public hearing, had granted the developer a permit to appropriate water from the river (Tr. 484, 526). The company had been selling lots since May 12, 1974 (Tr. 539).

A. THE INTERSTATE LAND SALES FULL DISCLOSURE ACT

The Interstate Land Sales Full Disclosure Act ("the Disclosure Act"), with which the company had complied, is designed to prevent abuses in the sale of unimproved tracts of land by requiring developers to make full public disclosure of information needed

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[3] The company stated that the County Health officer had approved the installation of septic tanks in the subdivision (R. 889).

[4] After OILSR notified the developer of deficiencies in its filing, the company submitted an amended statement of record, which became effective on May 2, 1974 (Pet. App. A, p. 3a).

by potential buyers. S. Rep. No. 1123, 90th Cong., 2d Sess. 109 (1968). The Act is based on the full disclosure provisions of the Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. 77a *et seq.*, which it parallels in many aspects. 111 Cong. Rec. 27310 (1965) (remarks of Senator Williams).[5] Section 1404(a)(1) of the Act makes it unlawful for the developer of a subdivision meeting statutory criteria "to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails * * * to sell or lease any lot in any subdivision unless a *statement of record* with respect to such lot is in effect * * * and *a printed property report* * * * is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser." 15 U.S.C. 1703(a)(1) (emphasis added).

The statement of record and the property report are prepared by the developer. They contain information describing the condition of the subdivision, its state of title, and other information of importance to potential purchasers.[6] 15 U.S.C. 1705, 1707. Under OILSR's regulations, the property report is a required part of the statement of record. 24 C.F.R. 1710.20(a) and (e), 1710.110.

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[5] The Disclosure Act was adopted as Title XIV of the Housing and Urban Development Act of 1968, 82 Stat. 476, 590. As proposed by Senator Williams in 1965 and 1967, the Securities and Exchange Commission would have been responsible for its administration. 111 Cong. Rec. 27310–27311 (1965); 113 Cong. Rec. 315–316 (1967).

[6] The statement of record must contain: details about ownership interest in the lots involved; a description and map of the subdivision; statements describing title, terms and conditions for disposing of lots, the condition of the subdivision, including access,

The subdivision is registered by filing the statement of record and property report with OILSR, and the statement is effective only with respect to the lots specified therein. The statement becomes effective automatically on the thirtieth day after filing or such earlier date as the Secretary may determine. 15 U.S.C. 1704, 1706(a); 24 C.F.R. 1710.20, 1710.21. If the Secretary determines that the statement of record is incomplete or inaccurate in any material respect, and so notifies the developer within 30 days of filing, the effective date is suspended until 30 days after the developer files the additional information. 15 U.S.C. 1706(b).[7]

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noise, safety, sewage, utilities, proximity to municipalities, the nature of the developers' proposed improvements, and a schedule of completion; and a statement of the consequences for individual purchasers of a failure by the persons bound to fulfill obligations under any blanket encumbrances. In addition it must contain copies of instruments of incorporation, trust or partnership of the developer or any other person holding legal title to the property; conveyance forms to be used in selling lots; any instruments creating easements or restrictions with respect to such lots; financial statements of the developer and such additional matters "as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers." Section 1406, 15 U.S.C. 1705.

The property report must contain such information from the statement of record, except copies of instruments, as the Secretary deems necessary, and "such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers." Section 1408, 15 U.S.C. 1707.

[7] The Secretary also has the power to suspend an already effective statement, after notice and opportunity for hearing, if she determines that it includes an untrue statement of a material fact or omits to state any material fact necessary to make the statement not misleading. Section 1407(d), 15 U.S.C. 1706(d).

The Disclosure Act provides that "[t]he fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean the Secretary has in any way passed upon the merits of, or given approval to, such subdivision." 15 U.S.C. 1716. It also prohibits any person from advertising or representing that the Secretary approves or recommends the subdivision or the sale or lease of lots in it. 15 U.S.C. 1707(b), 1716.[8]

B. THE PROCEEDINGS BELOW

1. THE DISTRICT COURT'S DECISION

The district court, agreeing with respondents' evidence at the hearing, found that the development would have a substantial actual or potential effect on

[8] The disclosure requirements of the Act are enforceable by both private and government civil remedies, and by criminal sanctions. A contract for the purchase of a lot in a subdivision is voidable at the option of the purchaser if a property report is not furnished in advance or at the signing. Section 1404(b), 15 U.S.C. 1703(b). Civil damage suits are authorized for untrue statements or omissions in the statement of record, and for sales without an effective statement of record, or without furnishing a property report to the purchaser in violation of Section 1404(a)(1), and for fraud in violation of Section 1404(a)(2). Section 1410, 15 U.S.C. 1709. Finally, under Section 1415, 15 U.S.C. 1714, the Secretary may sue to enjoin acts or practices in violation of the Act, and rules and regulations thereunder; and may refer evidence of such violations to the Attorney General, who may, in his discretion, prosecute any wilful violation as a felony, pursuant to Section 1418, 15 U.S.C. 1717. The federal and state courts have concurrent jurisdiction over civil remedies. Section 1420, 15 U.S.C. 1719.

the Illinois River and its drainage area, in part because of the effect of septic tanks (Pet. App. C, pp. 23a–24a), and that in light of the proposed prices for the lots in the subdivision and those that might later be platted, the Flint Ridge Development Company could earn a gross income of $47,250,000. "These figures," the court stated, "reflect the magnitude of the development and show that H.U.D.'s action in approving [the disclosure statements under the Disclosure Act] constituted major federal action" (*id.* at 22a).

According to the district court, "whenever a Federal agency makes a decision which permits action by other parties, public or private, which will affect the quality of the human environment, such decision constitutes major federal action" (*id.* at 26a, 28a). "Where a federal license or permit is involved, or where Congress possesses and has utilized its plenary power of regulation under the Interstate Commerce Clause, or other Constitutional authority, federal approval constitutes major federal action" (*id.* at 29a).

The court held that "[t]he approval of a filing under the Interstate Land Sales Act is in the nature of a federal license or permit, for without the approval it is unlawful to engage in sales and Congress has exercised its plenary power" under the Commerce Clause by enacting the Disclosure Act (*id.* at 29a).

The court therefore ordered HUD to conduct an environmental study of the effects of the Flint Ridge development on the quality of the human environment, specifically addressing itself to the five statutory

factors specified in Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C). It also "enjoined and restrained [HUD] from approving the * * * filing of Flint Ridge Development Co. until such time as the environmental impact study has been prepared and a public hearing held thereon." In addition, the court ordered HUD and OILSR "to immediately withdraw the approval of the Flint Ridge Development Co. filing" and, by its own order, declared the filing "suspended, vacated and held for naught" and prohibited all "further public sales" (*id.* at 31a–33a).

2. THE DECISION OF THE COURT OF APPEALS

On appeal by the federal defendants and Flint Ridge, the court of appeals reversed the district court's holding that there must be a public hearing on the environmental impact statement, but otherwise affirmed the lower court's decision (Pet. App. B, pp. 16a–17a). In the opinion of the appellate court (Pet. App. A, pp. 1a–12a), HUD's review of disclosure statements for adequacy under the statute and HUD's regulations (24 C.F.R. Part 1710) constitutes major federal action significantly affecting the quality of the human environment within the meaning of NEPA. A large real estate development, the court said, obviously has an environmental impact.

In the view of the court of appeals, this case involves "filing and approval of private action. The result of approval here is that the developer is free to seek funds in commerce for the development" (Pet. App. A, p. 7a). Hence, the court stated, this case is

analogous to government action in which HUD and other federal agencies approve particular projects, license them, or supply funding or financial guarantees (*id.* at 6a–9a).

The limited purpose of the Disclosure Act—to furnish potential buyers with necessary information—is irrelevant, the court ruled, because "the NEPA impact statement requirement applies to virtually all federal agencies and is not limited to those that are concerned with the environment. [It requires] attention to environmental problems regardless of whether the agency has authority to do anything about it" (*id.* at 10a). It was of no moment that under the Disclosure Act statements of record become effective within thirty days unless suspended; despite the limited grounds for suspension provided in the Act, the agency, according to the court, could routinely suspend statements of record pending the preparing and finalizing of an environmental impact statement (*id.* at 9a).[9]

ARGUMENT

INTRODUCTION AND SUMMARY

The decisions below rest on a fundamental misinterpretation of the Interstate Land Sales Full Disclosure Act and Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), and would severely interfere with,

[9] The court also held that the Disclosure Act's provision for court of appeals review of orders suspending registrations for incompleteness, inaccuracy, or untrue statements or omissions (15 U.S.C. 1710) were not exclusive; the district court, therefore, had jurisdiction of the NEPA claims under 28 U.S.C. 1331 (Pet. App. A, pp. 11a–14a).

if not render impossible, the proper administration of the Disclosure Act. Under that Act, OILSR currently has on record 7,000 effective filings from developers and, if the court of appeals' reasoning were followed, the agency might have to prepare an environmental impact statement in regard to each such disclosure statement. The crushing administrative burden this would entail is graphically illustrated by the fact that the number of such environmental impact statements by OILSR would exceed the total prepared by all federal agencies during NEPA's first four and a half years.[10] Moreover, under the decision below, an impact statement might be required whenever a developer files an amendment or a consolidation of prior filings, of which there are approximately 3,000 annually.[11] Thus, even if the decision below is confined to future filings, the number of impact statements could well exceed by ten-fold the highest annual number prepared by any agency of the federal government.[12]

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[10] By June 30, 1974, environmental impact statements had been prepared on 5,430 agency actions, of which 3,344 were final statements and 2,086 were drafts. Fifth Annual Report of the Council on Environmental Quality 388 (1974). It is estimated that in 1975, approximately 1,180 draft statements will be prepared by all agencies. Sixth Annual Report of the Council on Environmental Quality 639 (to be published in February, 1976.)

[11] Hearings on HUD-Space-Science-Veterans Appropriations for 1975 before a Subcommittee of the House Committee on Appropriations, Part 6, 93d Cong., 2d Sess. 1163 (1974); Hearings on Department of Housing and Urban Development—Independent Agencies Appropriations for 1976 before a Subcommittee of the House Committee on Appropriations, Part 5, 94th Cong., 1st Sess. 923 (1975).

[12] The Department of Transportation, which annually files the largest number of impact statements, filed 432 in 1973. Fifth An-

When a private developer's statement of record and property report becomes effective, OILSR makes no "recomn endation or report on proposals for * * * major Federal actions significantly affecting the quality of the human environment" pursuant to Section 102(2)(C) of NEPA. Accordingly, no environmental impact statement is required.

The Disclosure Act bars the Secretary from passing on the merits of, or approving, the subdivision. 15 U.S.C. 1707(b), 1716. Because Congress intended to leave land use planning and control to state and local government, OILSR has power only to assure that relevant facts are adequately disclosed to purchasers when lots are sold in commerce. It has no planning functions or power to control subdivisions, and no financing responsibilities which might put the federal government in partnership with private developers.

If the developer makes adequate disclosure, OILSR has no power to suspend the effectiveness of his statements. Such disclosure statements are required, and are filed with OILSR, only when the developer is ready to sell lots. By then, improvements to the land significantly affecting the environment may already have been made, as they were in this case.

Section 102 of NEPA is concerned with action by federal agencies in their planning and decision-making functions. Thus environmental impact state-

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nual Report of the Council on Environmental Quality, *supra*, at 389. In contrast, in fiscal year 1974, 652 initial registrations, 520 consolidations and 3,414 amendments were filed with OILSR. In the previous year, 1,550 registration statements and 2,900 amendments were filed. These figures are from the congressional appropriations hearings, note 11, *supra*.

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ments are required only when an agency has such functions, and can therefore take account of environmental consequences. The Disclosure Act does not confer such responsibilities and powers.

Requiring OILSR to file impact statements would require it to pass on the environmental merits of subdivisions, despite Congress' express determination that it should not. Indeed, because developers' statements automatically become effective in 30 days, unless suspended for inadequate disclosure (15 U.S.C. 1706), and impact statements require months for careful analysis of consequences and alternatives, Congress could not have intended Section 102(2)(C) to apply. The Disclosure Act was based upon the disclosure requirements of the Securities Act of 1933. To require agencies like OILSR and the Securities and Exchange Commission to prepare environmental impact statements for each registration would impose a massive and unnecessary administrative burden which serves neither the purposes of NEPA, nor of the statutes requiring public disclosure of information about private offerings.

THE NATIONAL ENVIRONMENTAL POLICY ACT DOES NOT REQUIRE THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT BEFORE A DISCLOSURE STATEMENT FILED BY A PRIVATE REAL ESTATE DEVELOPER MAY BECOME EFFECTIVE PURSUANT TO THE INTERSTATE LAND SALES FULL DISCLOSURE ACT

Section 102(2)(C) of NEPA requires federal agencies to include "in every recommendation or report on proposals for legislation and other major Federal

actions significantly affecting the quality of the human environment" a detailed statement concerning environmental effects and alternatives. "In order to decide what kind of an environmental impact statement need be prepared"—or indeed whether any impact statement is required—"it is necessary first to describe accurately the 'federal action' being taken." *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 322.

The Disclosure Act provides that the filing with OILSR by a real estate developer of an effective statement of record, including a property report, shall not be "held to mean the Secretary has in any way passed upon the merits of, or given approval to, such subdivision." 15 U.S.C. 1716. The Act makes it unlawful for any person to represent that the agency "approves or recommends" the subdivision; persons who willfully violate this provision are subject to fine and imprisonment. 15 U.S.C. 1707(b), 1717.

As these provisions indicate, Congress intended the Disclosure Act to serve as a means of insuring that developers provide needed information to prospective purchasers, not as a charter for an agency of the federal government to sit in judgment of real estate developments. The Senate Report [13] states:

> These requirements mean that the seller of undeveloped land covered by this title would be required to inform the purchaser not only of the desirable aspects but also of any undesirable aspects. The purchaser will then be better able to make an intelligent decision. *This proposal does not authorize the Federal Govern-*

[13] S. Rep. No. 1123, 90th Cong., 2d Sess. 110 (1968).

> *ment to pass upon the quality of what is being sold or upon such questions as land value, land use, or zoning.* Its purpose is to give the purchaser the information necessary to make his own determination of the quality of what is being sold. [Emphasis added.] [14]

OILSR's powers under the Act are thus limited to assuring that, when developers sell lots, they disclose relevant facts to potential buyers. In administering the Act, OILSR has no planning function, disburses no funds and gives no guarantees; it has no control over the design of subdivisions, no authority to suggest alternatives, and no power to stop private development. It is not, in any sense, in partnership with the private developer. Cf. *Silva* v. *Romney*, 473 F. 2d 287 (C.A. 1). It is concerned only with the adequacy of disclosure to potential purchasers of information relevant to the sale or lease of lots. And, contrary to the court of appeals' reading of the Disclosure Act, if the developer makes adequate disclosure, OILSR has no statutory authority or discretion to suspend the effectiveness of his statement, whatever the environmental consequences.[15]

Nor, as the court of appeals apparently assumed (Pet. App. A, pp. 6a, 7a–9a), is the effective filing

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[14] Senator Williams stressed this limitation on HUD's authority in the congressional debates (114 Cong. Rec. 15272 (1968)): "It is not a regulatory statute which will permit the Federal Government to pass upon such questions as land value, its selling price, land use, or zoning. The only purpose of this legislation is to give the purchaser the necessary information upon which he can make his own investment decision."

[15] See Tr. 405–407 (testimony of John F. Weaver, Director of OILSR's Examination Division).

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of a statement of record a legal prerequisite to the initial financing and other pre-sale steps in the development of a subdivision. As was the case here, a developer may be substantially funded well in advance of filing with HUD, and may put in roads, lay out lots, arrange for water and sewage, clear trees and brush, and start construction on other facilities before he is ready to sell lots. Indeed, because compliance with the Disclosure Act is a prerequisite only to the sale or lease of lots in interstate commerce (15 U.S.C. 1703(a)(1)), and not to the funding of developments, actions significantly affecting the environment can occur well before the developer is required to file his statement of record and property report.

We submit that, in light of the foregoing, NEPA is inapplicable to the effectiveness of developers' filings with OILSR under the Disclosure Act. As Senator Jackson, the principal sponsor of NEPA, stated on the Senate floor, NEPA's procedural requirements simply direct "all agencies to assure consideration of the environmental impact of their actions in decisionmaking" (115 Cong. Rec. 40416 (1969)). Thus, Section 102(2)(A) of NEPA requires federal agencies to utilize a systematic interdisciplinary approach insuring integrated use of relevant science and design arts "*in planning* and *in decisionmaking* which may have an impact on man's environment" (emphasis added). Section 102(2)(B) directs such agencies to develop methods and procedures to ensure that environmental values "may be given appropriate consideration *in*

decisionmaking along with economic and technical considerations" (emphasis added). And Section 102 (2)(C) requires federal agencies to include an environmental impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."

Each of these requirements in Section 102 is aimed at federal agencies that have planning responsibilities or decisionmaking powers—agencies that can take account of the environmental consequences of their proposed actions and be guided accordingly.

When disclosure statements filed by developers with OILSR become effective, OILSR is not acting in that capacity. It is not, in the words of Section 102(2)(C), engaging in "major Federal actions significantly affecting" the environment and it is not making "recommendation[s] or report[s]" on proposals for such actions—both of which are prerequisites to requiring the agency to prepare an environmental impact statement. See *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 320. That the real estate development will have a significant environmental impact, as the district court found here, cannot transform a private project into a federal one.[16] "The action causing the impact must also be one where there is sufficient Federal control and responsibility to constitute 'Federal

[16] We do not contend that NEPA has no application whatever to the responsibilities of the Department of Housing and Urban Development, and in particular to the responsibilities of OILSR under the Disclosure Act. The issue here is narrower: whether

action' * * *." Council on Environmental Quality, Preparation of Environmental Impact Statements: Guidelines, 40 C.F.R. 1500.6(c).[17]

To hold otherwise, as did both courts below,[18] would read out of Section 102(2)(C) the requirement that there must be "major Federal actions significantly affecting" the environment and would result in requir-

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the agency must prepare environmental impact statements before statements of record and property reports may become effective as provided in the Act.

Section 1406(5) of the Disclosure Act recognizes that disclosure of some of the environmental aspects of a subdivision is necessary to protect prospective purchasers. It therefore requires such information in the statement of record and property report. The developer must provide information on such factors as roads, water, sewage, drainage, soil erosion, climate, nuisances, natural hazards, municipal services and zoning restrictions.

Section 1408(a) of the Disclosure Act, 15 U.S.C. 1707(a), confers on the Secretary authority to require by rule or regulation "other information" from developers in both the "public interest" and for the "protection of purchasers." The Secretary, therefore, has authority to adopt rules requiring environmental information from developers to be incorporated into property statements to be furnished to prospective purchasers. This is obviously different from conditioning the effectiveness of property statements and statements of record on preparation by OILSR of environmental impact statements.

[17] See *Biderman* v. *Morton*, 497 F.2d 1141, 1148 (C.A. 2): "The statutory scheme devised by Congress leaves the Secretary absolutely powerless to arrest the allegedly destructive development * * *. We simply cannot, by granting injunctive relief, arm the Secretary with 'go-ahead' power when Congress * * * saw fit not to do so."

[18] The court of appeals said that one of the purposes of NEPA "is to require the giving of attention to environmental problems regardless of whether the agency has authority to do anything about it" (Pet. App. A, p. 10a).

The district court said that "whenever a Federal agency makes a decision which permits action by other parties, public or private,

ing federal agencies to prepare impact statements evaluating the effects of private activities that they do not initiate, participate in or control.[19] Yet "[t]he unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives." *Environmental Defense Fund* v. *Corps of Engineers,* 470 F. 2d 289, 298 (C.A. 8);[20] see *Gage* v. *United States Atomic Energy Commission,* 479 F. 2d 1214, 1220 n. 19 (C.A.D.C.).

Indeed, it is not simply that NEPA imposes no duty on OILSR to prepare environmental impact statements when developers file; the agency is forbidden by the Disclosure Act from voluntarily undertaking such a task. Under Section 102(2)(C) of NEPA, OILSR's preparation of an impact statement would require it to pass upon the merits of the subdivision, to assess the private project in terms of its positive and negative environmental effects, to evaluate the alternative uses of the land[21]—in short, to en-

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which will affect the quality of the human environment, such decision constitutes major federal action, which is what occurred in this case" (Pet. App. C, p. 26a).

[19] See Note, *Scenic Rivers Association* v. *Lynn: The Effect of NEPA on the Interstate Land Sales Act*, 124 U. Pa. L. Rev. 250 (1975).

[20] In the instant case, it is hardly clear what the district court expected OILSR to do as a result of its preparing the impact statement, except to file it with the court and make it available under the Freedom of Information Act, 5 U.S.C. 552. Pet. App. C, pp. 31a–33a; Tr. 559–560.

[21] See generally the Council on Environmental Quality's Guidelines, 40 C.F.R. 1500.8 ("Content of environmental statements").

gage in the kind of activity Congress prohibited it from doing.[22]

If OILSR must prepare impact statements, as the court of appeals held, a consumer protection statute of intentionally limited scope would be turned into a far-reaching scheme of federal land use planning and controls, despite the fact that Congress decided to leave this regulatory area to state and local governments,[23] where the responsibility traditionally has been.[24]

Moreover, the Disclosure Act provides that a statement of record becomes effective automatically 30 days after filing unless the Secretary acts affirmatively, within that time, to suspend it for inadequate disclosure. 15 U.S.C. 1706.[25] It is inconceivable that in 30 days an environmental impact statement could be prepared, circulated, commented upon, and then re-

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[22] See S. Rep. No. 1123, *supra*, at 110.

[23] The legislative decision to approach the problem through full disclosure rather than substantive regulation was deliberately chosen after several years of congressional consideration. See generally Coffey and Welch, *Federal Regulation of Land Sales: Full Disclosure Comes Down to Earth*, 21 Case Western Reserve L. Rev. 5 (1969).

[24] Many state and local governments impose environmental regulation upon new subdivisions. See Fifth Annual Report of the Council on Environmental Quality 49–70 (1974).

[25] Compare Section 8(a) of the Securities Act of 1933, 15 U.S.C. 77h(a), which provides that the registration statement for a securities offering becomes effective twenty days after it is filed, in the absence of a delaying amendment by the registrant or a stop order proceeding by the Securities and Exchange Commission. See *Jones* v. *Securities & Exchange Commission*, 298 U.S. 1, 15–18.

viewed in light of the comments.[26] This in itself indicates that NEPA does not require OILSR to prepare impact statements—the 30-day period is inadequate to allow for the kind of careful, long-range planning NEPA envisions.[27]

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[26] The Council on Environmental Quality Guidelines provide that "[t]o the maximum extent practicable" no action should be taken sooner than 90 days after a draft environmental impact statement (and 30 days after a final environmental impact statement) has been made available to the various agencies, the Council on Environmental Quality, and the public, for comment. 40 C.F.R. 1500.11(b). Agencies commenting on a draft statement are to have at least 45 days to make such comment. 40 C.F.R. 1500.9(f).

The Council on Environmental Quality also points out that (Sixth Annual Report, Council on Environmental Quality 639 (to be published February 1976)): "The Department of the Interior, with its great range of actions and internal administrative procedures, estimates that draft statements on simple projects prepared by experienced personnel require some 3 to 5 months, which time should be reduced in the near future. Complex projects, or simple ones prepared by the inexperienced, may double the time required, and complex projects prepared by inexperienced personnel may take up to 18 months to prepare. If a project or program is not considered on the critical path of Interior's decision process, as may be the case for some water resources and land management plans, then more time may be taken."

[27] Respondents contend that HUD Handbook 1390.1, the Handbook of Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality, 38 Fed. Reg. 19182 *et seq.*, amended 39 Fed. Reg. 38922, requires HUD to prepare an impact statement before a disclosure statement becomes effective under the Disclosure Act. See also HUD's Proposed Rules revising the Handbook. 39 Fed. Reg. 6816 *et seq.* This is incorrect. By its own terms, the Handbook does not apply to registrations under the Disclosure Act. It is true that Section 5(a)(1) of the Handbook, 38 Fed. Reg. 19185, does not specifically list sub-

The court of appeals attempted to avoid this problem, stating that "[t]here is nothing in the statute, however, which prohibits the agency from suspending a statement of record pending the preparation and filing of an impact statement" (Pet. App. A, p. 9a). On the contrary, the Disclosure Act expressly limits HUD's suspension power to situations in which the developer has failed to make the required disclosure. 15 U.S.C. 1706. The court of appeals' reading of the statute renders the 30-day provision a nullity in regard to every subdivision that has sufficient environmental impact to require some form of environmental clearance. In such cases, no statements of record could go into effect within the 30 days provided by Congress, yet the purpose of that provision, as the court below itself recognized (Pet. App. A, p. 9a), is to protect developers from costly delays as a result of the need to register with HUD.[28]

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division registrations among activities exempt from the agency's NEPA procedures and states that except for those exemptions, "all HUD actions must undergo one or more environmental clearances." However, Section 1 of the Handbook states that its provisions apply to "HUD legislative proposals, policy and guidance documents * * * and individual project approval actions on insurance, loans and grants, subsidies and demonstration projects." 38 Fed. Reg. 19182. Subdivision registrations do not fall within any of these categories.

[28] The court of appeals also suggested that "a developer could give advance notice to HUD of its intent to sell land in interstate commerce, whereby HUD could commence the preparation of its impact statement" (Pet. App. A, pp. 9a–10a). Such an approach would not avoid the long delays inherent in preparing an impact statement because the agency could not begin to weigh the environmental merits of a project until the plans were fully worked out—

Congress designed the Disclosure Act to be strictly and exclusively a disclosure statute for the protection of purchasers of land in the same way that the Securities Act of 1933, on which it was modeled, protects investors. NEPA does not repeal prior legislation by implication; it does not apply where its mandate and that of another statute are mutually exclusive;[29] and it does not give HUD substantive regulatory authority that Congress specifically denied it in the applicable statute.[30]

Thus, while NEPA may, in some sense, be described as a "disclosure law," this does not convert OILSR's limited authority into a power to weigh the environ-

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at which point the developer would be ready to file his disclosure statement and begin sales.

[29] Sections 104, 105, 42 U.S.C. 4334, 4335; see *United States* v. *SCRAP*, 412 U.S. 669, 694.

[30] Because the language and legislative history of the Disclosure Act make clear that it confers on HUD no power to approve, endorse, guarantee, or finance developments, the court of appeals erred in relying on cases under other statutes involving such major federal actions as approvals, licenses, funding or guarantees (Pet. App. A, pp. 6a–9a). Its error is illustrated by its reliance on *Davis* v. *Morton*, 469 F. 2d 593 (C.A. 10), which it described as dealing "with a matter * * * very similar to that here presented" (Pet. App. A, pp. 6a–7a). In that case the court held that an impact statement was required from the Department of the Interior for a long-term lease of Indian lands to a real estate developer. The lease repeatedly referred to the federal government, its rights and liabilities. More importantly, the Secretary of the Interior was required, acting in a fiduciary capacity, to make a determination on the substantive merits of the lease. In fact, he was specifically required to consider the environmental effects of the lease. 25 U.S.C. 415. No similar substantive regulatory authority is granted to, or exercised by, HUD under the Disclosure Act.

mental merits of private real estate developments (Pet. App. A, p. 11a). NEPA is primarily a tool for agency planning and decisionmaking, requiring the study and disclosure of environmental consequences of agency decisions in the belief that the process itself and the public scrutiny it allows will ultimately result in federal decisionmaking that weighs all aspects of the public interest. But NEPA is not intended to make federal agencies "disclose" the environmental effects of private decisions over which they have no substantive control. Since OILSR cannot pass on the environmental merits of subdivisions described in adequate disclosure statements and cannot, because of objections on environmental grounds, take any other action to prevent sales of lots within them, impact statements would constitute nothing more than a massive and unnecessary administrative burden on OILSR. See pp. 10–11, *supra*.

Furthermore, the decision below has serious implications for other federal agencies with which disclosure statements describing private offerings must be filed. As noted above, the Disclosure Act is patterned on the disclosure provisions of the Securities Act of 1933, 48 Stat. 77–80, as amended, 15 U.S.C. 77e–77h. If, as the court of appeals indicates (Pet. App. A, p. 8a), the Securities and Exchange Commission must prepare environmental impact statements in regard to offerings of corporate securities,[31] that agency, which supports this brief, advises that the na-

[31] The court of appeals' observation (Pet. App. A, p. 8a), that NEPA applies to securities offerings misreads the authority cited

tion's private capital markets could be severely affected by the resulting delays.[32]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1976.

(*National Resources Defense Council, Inc.* v. *Securities & Exchange Commission*, 389 F. Supp. 689 (D. D.C.)). That case held only that Securities and Exchange Commission rule-making dealing with the inclusion of environmental information in registration statements had not complied with the Administrative Procedure Act. It in no way suggests that impact statements must be prepared for each registration statement the Securities and Exchange Commission allows to become effective.

[32] In fiscal year 1973, 3,281 registration statements became effective pursuant to the Securities Act of 1933. Securities and Exchange Commission 39th Annual Report 31 (1974). Some 2,890 registration statements became effective during fiscal 1974 (Securities and Exchange Commission, 40th Annual Report 167 (1975)) and the Commission records show that in fiscal 1975, 2,781 statements involving offerings with an aggregate value of $77.46 billion became effective.

APPENDIX

Sections 102–105 of the National Environmental Policy Act of 1969, 83 Stat. 853–854, 42 U.S.C. 4332–4335, provide as follows:

SEC. 102 [42 U.S.C. 4332]. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

"(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

"(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantitied environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"'(i) the environmental impact of the proposed action,

"'(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"'(iii) alternatives to the proposed action,

"'(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"'(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.'

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

"(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

"(E) recognize the worldwide and long range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

"(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintain-

ing, and enhancing the quality of the environment;

"(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

"(H) assist the Council on Environmental Quality established by title II of this Act."

SEC. 103 [42 U.S.C. 4333]. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

SEC. 104 [42 U.S.C. 4334]. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

SEC. 105 [42 U.S.C. 4335]. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

The Interstate Land Sales Full Disclosure Act, 82 Stat. 590, as amended, 15 U.S.C. 1701 *et seq.*, provides in pertinent part:

PROHIBITIONS RELATING TO THE SALE OR LEASE OF LOTS IN SUBDIVISIONS

SEC. 1404 [15 U.S.C. 1703]. (a) It shall be unlawful for any developer or agent, directly or

indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—

"(1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1407 and a printed property report, meeting the requirements of section 1408, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser;"

* * * * *

REGISTRATION OF SUBDIVISIONS

SEC. 1405 [15 U.S.C. 1704]. (a) A subdivision may be registered by filing with the Secretary a statement of record, meeting the requirements of this title and such rules and regulations as may be prescribed by the Secretary in furtherance of the provisions of this title. A statement of record shall be deemed effective only as to the lots specified therein.

(b) At the time of filing a statement of record, or any amendment thereto, the developer shall pay to the Secretary a fee, not in excess of $1,000, in accordance with a schedule to be fixed by the regulations of the Secretary, which fees may be used by the Secretary to cover all or part of the cost of rendering services under this title, and such expenses as are paid from such fees shall be considered non-administrative.

(c) The filing with the Secretary of a statement of record, or of an amendment thereto, shall be deemed to have taken place upon the receipt thereof, accompanied by payment of the fee required by subsection (b).

(d) The information contained in or filed with any statement of record shall be made available to the public under such regulations

as the Secretary may prescribe and copies thereof shall be furnished to every applicant at such reasonable charge as the Secretary may prescribe.

INFORMATION REQUIRED IN STATEMENT OF RECORD

SEC. 1406 [15 U.S.C. 1705]. The statement of record shall contain the information and be accompanied by the documents specified hereinafter in this section—

"(1) the name and address of each person having an interest in the lots in the subdivision to be covered by the statement of record and the extent of such interest;

"(2) a legal description of, and a statement of the total area included in, the subdivision and a statement of the topography thereof, together with a map showing the division proposed and the dimensions of the lots to be covered by the statement of record and their relations to existing streets and roads;

"(3) a statement of the condition of the title to the land comprising the subdivision, including all encumbrances and deed restrictions and covenants applicable thereto;

"(4) a statement of the general terms and conditions, including the range of selling prices or rents at which it is proposed to dispose of the lots in the subdivision;

"(5) a statement of the present condition of access to the subdivision, the existence of any unusual conditions relating to noise or safety which affect the subdivision and are known to the developer, the availability of sewage disposal facilities and other public utilities (including water, electricity, gas, and telephone facilities) in the subdivision, the proximity in miles of the subdivision to nearby municipalities, and the nature of any improvements to be installed by the de-

veloper and his estimated schedule for completion;

"(6) in the case of any subdivision or portion thereof against which there exists a blanket encumbrance, a statement of the consequences for an individual purchaser of a failure, by the person or persons bound, to fulfill obligations under the instrument or instruments creating such encumbrance and the steps, if any, taken to protect the purchaser in such eventuality;

"(7)(A) copy of its articles of incorporation, with all amendments thereto, if the developer is a corporation; (B) copies of all instruments by which the trust is created or declared, if the developer is a trust; (C) copies of its articles of partnership or association and all other papers pertaining to its organization, if the developer is a partnership, unincorporated association, joint stock company, or any other form of organization; and (D) if the purported holder of legal title is a person other than developer, copies of the above documents for such person;

"(8) copies of the deed or other instrument establishing title to the subdivision in the developer or other person and copies of any instrument creating a lien or encumbrance upon the title of developer or other person or copies of the opinion or opinions of counsel in respect to the title to the subdivision in the developer or other person or copies of the title insurance policy guaranteeing such title;

"(9) copies of all forms of conveyance to be used in selling or leasing lots to purchasers;

"(10) copies of instruments creating easements or other restrictions;

"(11) such certified and uncertified financial statements of the developer as the Secretary may require; and

"(12) such other information and such other documents and certifications as the Secretary

may require as being reasonably necessary or appropriate for the protection of purchasers."

TAKING EFFECT OF STATEMENTS OF RECORD AND AMENDMENTS THERETO

SEC. 1407 [15 U.S.C. 1706]. (a) Except as hereinafter provided, the effective date of a statement of record, or any amendment thereto, shall be the thirtieth day after the filing thereof or such earlier date as the Secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the consent of the Secretary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidated statement of record any material changes in the information contained in the earlier statement.

(b) If it appears to the Secretary that a statement of record, or any amendment thereto, is on its face incomplete or inaccurate in any material respect, the Secretary shall so advise the developer within a reasonable time after the filing of the statement or the amendment, but prior to the date the statement or amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statement or the amendment until thirty days after the developer files such additional infor-

mation as the Secretary shall require. Any developer, upon receipt of such notice, may request a hearing, and such hearing shall be held within twenty days of receipt of such request by the Secretary.

(c) If, at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement, the developer shall promptly file an amendment thereto. Upon receipt of any such amendment, the Secretary may, if he determines such action to be necessary or appropriate in the public interest or for the protection of purchasers, suspend the statement of record until the amendment becomes effective.

(d) If it appears to the Secretary at any time that a statement of record, which is in effect, includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statement therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in accordance with such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

(e) The Secretary is hereby empowered to make an examination in any case to determine whether an order should issue under subsection (d). In making such examination, the Secretary or anyone designated by him shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the developer, any agents, or any other person, in respect of any matter relevant to the examination. If the developer or any agents shall fail

to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of an order suspending the statement of record.

(f) Any notice required under this section shall be sent to or served on the developer or his authorized agent.

INFORMATION REQUIRED IN PROPERTY REPORT

SEC. 1408 [15 U.S.C. 1707]. (a) A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record, and any amendments thereto, as the Secretary may deem necessary, but need not include the documents referred to in paragraphs (7) to (11), inclusive, of section 1406. A property report shall also contain such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers.

(b) The property report shall not be used for any promotional purposes before the statement of record becomes effective and then only if it is used in its entirety. No person may advertise or represent that the Secretary approves or recommends the subdivision or the sale or lease of lots therein. No portion of the property report shall be underscored, italicized, or printed in larger or bolder type than the balance of the statement unless the Secretary requires or permits it.

* * * * *

UNLAWFUL REPRESENTATION

SEC. 1417 [15 U.S.C. 1716]. The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the

statement of record is true and accurate on its face, or be held to mean the Secretary has in any way passed upon the merits of, or given approval to, such subdivision. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing.

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NO. 75-545

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October Term, 1975

CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.,

Petitioners,

vs.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL,

Respondents.

AMICUS CURIAE BRIEF

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AMICUS CURIAE BRIEF

Initially, it should be brought to the court's attention that the State of New Mexico agrees with Respondents on all legal points presented on appeal and adopts them in toto as summarized below:

POINT I

THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY RULED THAT NEPA APPLIES TO ALL FEDERAL ACTIONS WHICH SIGNIFICANTLY AFFECT THE QUALITY OF THE HUMAN ENVIRONMENT, WHETHER THAT ACTION CONSISTS OF DIRECT FEDERAL IMPACT ON THE ENVIRONMENT OR ACTIONS TAKEN BY OTHER PERSONS WHICH WILL HAVE A SIGNIFICANT ENVIRONMENTAL IMPACT AND FOR WHICH FEDERAL PERMISSION IS REQUIRED, OR WHICH SET INTO MOTION THE ENVIRONMENTAL DEGRADATION.

POINT II

COMPLIANCE WITH NEPA BY HUD, AS THE ADMINISTERING AGENCY UNDER ILSA, IS NOT EXPRESSLY PROHIBITED BY STATUTE NOR IMPOSSIBLE.

POINT III

CONSIDERATIONS OF IMMENSE ADMINISTRATIVE BURDEN OR WIDESPREAD ADVERSE ECONOMIC IMPACT ARE NOT FACTUALLY SUBSTANTIATED, NOR ARE THEY MATTERS FOR JUDICIAL CONCERN.

In view of several factors, including consideration of judicial economy, we feel it unnecessary to independently brief all of these issues. Respondents have done a commendable job. However, the decision of the court in this case will have great significance for the State of New Mexico, and for this reason we feel it incumbent upon us to elaborate on one point which we consider particularly relevant to our state.

POINT IV

HUD'S LACK OF POWER UNDER ILSA TO ACT IN REGARD TO ENVIRONMENTAL CONSEQUENCES DOES NOT EXCEPT IT FROM THE PROVISIONS OF NEPA, IN VIEW OF NEPA'S PURPOSE OF DISSEMINATING ENVIRONMENTAL INFORMATION.

Petitioners make the argument that the Interstate Land Sales Act (ILSA), 15 U.S.C. Sec. 1701 et seq., does not confer upon the Department of Housing and Urban Development (HUD) any substantive authority, and therefore its actions under the act do not constitute "major federal action." Respondents have successfully refuted this argument in both the District Court and Court of Appeals, and we urge the court to keep Respondents' arguments in mind while considering this brief. However, we feel it necessary to stress to the court, in opposition to Petitioners' arguments, one particular point. The main purpose of NEPA and its environmental impact statement (EIS) requirement is to provide environmental information for not only governmental decision makers but all governmental entities and the public as a whole, "to enrich the understanding of the ecological systems and natural resources important to the Nation." 42 U.S.C. Sec. 4321.

The Congressional intent with regard to NEPA has been recognized by the federal courts in numerous decisions. The United States Court of Appeals, District of Columbia Circuit, in *Scientists' Inst. For Pub. Info. Inc. v. Atomic Energy Com'n.*, 481 F.2d 1079, 1091 (D.C. Cir. 1973), stated:

> "***These procedural requirements are not dispensable technicalities, but are crucial if the statement is to serve *its dual functions of informing Congress, the President, other concerned agencies and the public of the environmental effects of agency action and of ensuring meaningful consideration of environmental factors at all stages of agency decision making.*" [Emphasis added.]

The court in the case of *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2nd Cir. 1972), described NEPA as an "environmental full disclosure law for agency decisic n makers and the general public."

In *Committee For Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971), the court further explained the function of an EIS:

> "***the officials making the ultimate decision, whether within or outside the agency, must be informed of the full range of responsible opinion on the environmental effects in order to make an informed choice. *Moreover, the statement has significance in focusing environmental factors for informed appraisal by the President, who has broad concern even when not directly involved in the decisional process, and in any event by Congress and the public.*" [Emphasis added.]

See also *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

Circuit Judge Doyle in the court below specifically rejected Petitioners' argument with the following reference to the EIS requirement of NEPA:

> "One of its purposes is to require the giving of attention to environmental problems regardless of whether the agency has authority to do anything about it." *Scenic Rivers Association of Oklahoma v. Lynn*, 520 F.2d 239, 245 (10th Cir. 1975).

Accordingly, the courts have recognized that an EIS is of tremendous value to a diverse audience and in situations of federal action other than merely the situation in which an agency has authority to do something about the environmental consequences.

Nowhere in NEPA is there language which even remotely supports Petitioners' position of restricting application of the EIS requirement. In fact, the language of NEPA is replete with statements requiring broad implementation of its provisions in

all federal agencies. See 42 U.S.C. Sec. 4331, 4333. Obviously, the policy of NEPA to serve as a provider of environmental information would be severely restricted if it were determined that an EIS is required only in the instance in which an agency or other federal entity has the statutory authority to act with regard to the environmental consequences resulting from its actions. Such an interpretation would be contrary to the fundamental purpose of the act.

Respondents have persuasively shown that, under the facts of this case, the action of HUD, as the implementing agency of ILSA, qualifies as "major federal action significantly affecting the quality of the human environment," on the basis of HUD's participation and the undisputed environmental damage which follows. To remove HUD from the broad realm of NEPA solely for the reason that it does not possess certain statutory authority would be to completely disregard the intent of the Congress as evidenced by the language of the act and as recognized by numerous federal courts. The EIS provides valuable environmental material for use by governmental entities and the public in many areas, as background for proposed future remedies, and as a factual foundation for possible curative legislation.

The application of NEPA to HUD with respect to ILSA is of great importance to New Mexico. Presently, in New Mexico there exist approximately three hundred and fifty separate land subdivisions covering an estimated 1.5 million acres. The financial success of many of these developments is dependent upon sales in interstate commerce. Most developers are forced to abide by the disclosure requirements of ILSA. Such massive development occurring at a rapid pace creates quite a problem for this state as far as maintaining present environmental standards. Moreover, because development is proceeding in areas of widely diverse environmental conditions, often with a very fragile ecological balance, the situation has been exacerbated.

Serious problems have already been created, frequently of diverse cause, with respect to air quality, water quality (liquid

waste) and water supply, solid waste, terrain management, insect and rodent control. Although the effects are obviously widespread, the ultimate results are to a large degree unknown, thus necessitating a massive research and planning effort to adequately cope with these changing conditions.

Control of land developments in New Mexico is now handled by means of the New Mexico Subdivision Act, Sections 70-5-1 et seq., NMSA, 1953 Comp. Under this legislation much of the actual control is delegated to the boards of county commissioners. They are to promulgate regulations covering the following environmental areas: water supply, water quality (liquid waste), solid waste disposal, adequate roads and terrain management. Sec. 70-5-9, *supra.* However, in order to draft appropriate regulations and to properly evaluate the effect that approval of a particular subdivision will have, sufficient environmental data must be available. Unfortunately, the county government is ill-equipped to gather this type of information. While the act provides for public hearings before regulations can be adopted (Sec. 70-5-10, *supra*), and requires subdividers to submit a disclosure statement which is to include some environmental information (Sec. 70-5-17, *supra*), these provisions are incapable of replacing the quality and depth of information which an EIS would make available to agencies entrusted with environmental management and to the general public, including the "ethical purchaser."

The provisions of NEPA make clear that this kind of informational transfer was one of the main purposes of the act.

> "The Congress authorizes and directs that to the fullest extent possible: ***(2) all agencies of the Federal Government shall--***(F) *make available* to states, counties, municipalities, institutions and individuals, advice and information useful in restoring, maintaining and enhancing the quality of the environment;***." 42 U.S.C. Sec.4332. See also 42 U.S.C. Sec.4331.

In conclusion, we urge the court to affirm the decision of the Court of Appeals. One of the main purposes of NEPA is to

provide information in relation to certain federal actions which significantly affect the environment. The EIS is the vehicle providing that information. Respondents have shown that HUD's action is a "major federal action significantly affecting the quality of the human environment." To rule that HUD as the administering agency for ILSA does not have to file an EIS, because it has no power to act in regard to environmental consequences, would be to close your eyes to the intent and purpose of NEPA.

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